

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022-009661

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



SIGNATURE

DATE: 18 March 2025

In the matter between:

K2012020306 (PTY) LTD

First Plaintiff

STUART ALAN JOHN SAUNDERS

Second Plaintiff

and

GERT LOURENS DE WET N.O.

First Defendant

MARTHA ESTELLE SYMES N.O.

Second Defendant

MARC BRADLEY BEGINSEL N.O.

Third Defendant

SENEKAL SIMMONDS INC.

Fourth Defendant

JOHANNES HENDRIK SENEKAL

Fifth Defendant

EWAN RONALD SIMMONDS

Sixth Defendant

SHAUN PRESTON HANGONE

Seventh Defendant

Summary: *Rule 18(1) of the Uniform Rules of Court - Attorney bestowed with Right of Appearance in the High Court is not required to sign the pleadings twice – Previous Judgments not followed.*

JUDGMENT

NOKO, J

Introduction

[1] There are several applications between the parties. The parties agreed that the following applications¹ should be commenced with, first, the adjudication of the status of the plaintiffs' action under the above case number. Secondly, plaintiffs' application in terms of Rule 30 of the Uniform Rule of Court. Thirdly, two applications for leave to amend the defendants' plea. For ease of reference the parties are referred to as they are in the main action.

[2] The parties sought an audience with the Deputy Judge President to refer the matter to the Commercial Court, which referral was permitted and the matter accordingly allocated. A meeting was scheduled with all the parties during which it was stated that several dates had been allocated for different applications launched by the parties. Having identified the applications to be adjudicated first (as stated above) I then issued a directive that heads of argument must be filed on 13 December 2024.

[3] In addition to their heads of argument, the defendants delivered a rectified plea² which is signed twice by their attorney and condonation for the late filing thereof. The defendants further delivered a replying affidavit in respect of the second application for the amendment of the plea.

¹ Other applications excluding those serving before me include application for summary judgment, exception and application for consolidation of two actions instituted by the plaintiffs.

² The plaintiffs have stated in their Rule 30 Notice that the plea delivered by the Defendants was defective as it was not signed twice by the attorney who only signed once as an attorney having right of Appearance in the High Court and not also as attorney of record as contemplated in terms of Rule 18 of the Uniform Rules of Court.

[4] The plaintiffs, in turn, delivered an application to strike out the application for amendment, arguing that the original plea was *pro non scripto*, as the service of a rectified plea constituted an admission or acknowledgement by the defendants that their initial plea was defective. Furthermore, the plaintiffs contended that, since the defendants were under bar when the defective plea was delivered, the service of the rectified plea had to be preceded by an application for the upliftment of the bar in terms of Rule 27 of the Uniform Rules of Court. The plaintiffs also sought condonation for the short service of the application to strike out.

Background

[5] The background set out below is largely common cause between the parties. The said background has not been comprehensively chronicled in this judgment instead it has been truncated for the purposes of the interlocutory applications serving before me.

[6] At all relevant times, the second plaintiff was the sole director of KNS Construction (Pty) Ltd (“KNS”), which was appointed as the main contractor for a development project by a partnership called Genesis on Fairmont Joint Venture Partnership (“Genesis”). A dispute arose between KNS and Genesis, which was referred to arbitration. Genesis required KNS to provide security for costs before proceedings with arbitration and then approached the Court and obtained an order to that effect which was granted on 28 November 2012.

[7] In the meantime, KNS was placed under liquidation, with the liquidation order taking effect from 8 October 2013. Mr CF De Wet was appointed as a liquidator, together with the second and third defendants. Following, Mr CF De Wet’s passing in 2017, Gert Louwrens Steyn De Wet was appointed in his stead on 30 January 2018.

[8] The second plaintiff undertook to provide the requisite security in the sum of R1 million, which would be paid and be held in a trust account³ held by the liquidators’ attorneys, Senekal Simmonds Inc (fourth defendant). A separate interest-bearing account would be opened to hold these funds. The attorneys would issue a guarantee for the arbitration costs, which would be payable only once the arbitration proceedings had been completed and

³ The decision to pay the funds into a trust account followed the rejection of a Nedbank Guarantee by the attorneys acting for Genesis.

the costs taxed. The remaining balance would be refunded to the plaintiffs.⁴ To this end, an agreement titled “Agreement as to Security for Costs”⁵ was entered into on 8 November 2013 between plaintiffs and the first to third defendants.

[9] The fourth defendant accepted the mandate to represent the liquidators in the arbitration proceedings on a contingency basis and entered into a contingency fee agreement with them on 26 November 2013. The liquidators and the plaintiffs entered into a further agreement, titled “Bridging Finance Agreement”, on 14 June 2014, to provide funding for expenses incurred by the fourth defendant for services to be rendered. The refund of the payments made under the Bridging Finance Agreement was to be effected from the sum collected by the liquidators from the debtors of the estate of KNS (*in liquidation*).

[10] In 2016, the parties agreed on repayment conditions, which were confirmed in the plaintiffs’ email dated 12 January 2016, attached to the plaintiffs’ particulars of claim and marked PoC 24-1. The email specifically stated that “...loan and costs will be returned either through the attainment of a successful lodgement of the Mutual and Federal matter (aqua) and/or by the release of the guarantee of fees if successful in the Genesis matter whichever is the soonest.”⁶

[11] The arbitration process was stayed as a result of the dissolution of the Genesis on Fairmont partnership. Vestacor Limited (“Vestacor”) was a partner in Genesis and appears to have taken over the obligations of the partnership. The liquidators then instituted an action against Vestacor and judgment by default was granted on 10 October 2019 in the sum of R27 million. The liquidators also obtained judgment against Mutual and Federal, which was subsequently set aside on appeal.

[12] The plaintiffs construed the judgment obtained against Vestacor as a success in arbitration and proceeded to cancel the agreement as to security for costs. The plaintiffs, in addition, contend that in view of that judgment, the conditions for the refund, as set out in POC 24-1, have been met and the refund is due and payable. A demand for refund ensued which

⁴ There is a dispute as to whether such balance may have to be applied elsewhere by the attorneys.

⁵ The parties subsequently entered into variations which are not relevant for the purposes of this judgment.

⁶ See plaintiffs’ particulars of claim at CL12-693.

was followed by summons being issued against the defendants. The plaintiffs' suit consists of 13 claims against the defendants, divided into two parts, each having at least three sub-parts. Part A, predicated on the breach of the Agreement as to Security for Costs, is divided into:

- 12.1 Part A1, a claim based on breach of contract and/or success before arbitration;
- 12.2 Part A2, based on delict, alleging that the first to third defendants failed to exercise a duty of care in executing the agreement with the plaintiffs;
- 12.3 Part A3, concerning the misappropriation of trust funds by the fourth to the seventh defendants and the inducement of the plaintiffs to enter into an agreement.

[13] The claim under Part B related to the Bridging Finance Agreement was also divided into three sub-parts.

- 13.1 Part B1 was for the breach of the Bridging Finance Agreement.
- 13.2 Part B2 is founded on delict emanating from allegations of inducement to contract. In this regard, it is alleged that the defendants induced the plaintiffs to provide funding with the promise that they would be refunded from monies received from debt collection.
- 13.3 Part B3 is based on damages suffered as a result of fourth to seventh defendants, while acting for the first to third defendants, breaching a duty of care owed to the second plaintiff.

[14] The defendants failed to deliver the plea timeously and were served with a notice of bar by the plaintiffs. The defendants then served a plea dated 22 September 2022, and in response, the plaintiffs delivered an application for summary judgment, which was set down for 13 March 2023. The defendants filed an affidavit in opposition to the summary judgment on 3 March 2023, stating that payment to the plaintiffs would be effected upon a successful judgment in the Mutual and Federal matter (aqua) and/or by the release of the guarantee for fees if successful in the Genesis matter, whichever occurs first. The successful judgment obtained against Mutual and Federal by the defendants was set aside on appeal; therefore, no successful

judgment would ever be attained.⁷ The arbitration was stayed due to the dissolution of the Genesis partnership. The judgment obtained by default against Vestacor was rescinded, and the legal proceedings against Vestacor were dismissed.⁸

[15] On 6 July 2023, just before the hearing date for the summary judgment, the defendants delivered a notice of intention to amend their plea, in which it was indicated that the conditions set out for payment had not been met and would never be met, as the default judgment granted against Vestacor was rescinded and the appeal in the Mutual and Federal matter had been dismissed.

[16] The plaintiffs then launched the second action under case number 2023/132503 based on the new information discovered in July 2023 after the permission to access the documents under case number 30238/2019. The defendants lodged a further notice of intention to amend their plea on 11 April 2024, adding a special plea of waiver, contending that some paragraphs in the second action cannot co-exist with those set out in the first action, and that the first action should be considered or deemed abandoned.

[17] The plaintiffs opposed both notices of intention to amend, and the defendants launched applications for leave to amend, which are now serving before me.

[18] In view of the foregoing, the issues to be adjudicated upon would be as follows:

- 18.1 The defendants' application for the condonation for the late delivery of the rectified plea;
- 18.2 The defendants' delivery of the replying affidavit in the second application to amend;
- 18.3 The plaintiffs' application to strike out;
- 18.4 The application to determine the status/waiver of the first action; and lastly
- 18.5 The defendants' applications for the amendment.

⁷ See CL 12-694.

⁸ See CL 12-694 at para 47.

Submissions by the parties

Condonation for the late delivery of the rectified plea

[19] The defendants contended that the application for condonation is provisional and must be determined if the court concludes that the defendants' plea, dated 26 September 2022, is indeed defective due to the failure to have it signed twice by the attorney as required by Rule 18(1) of the Uniform Rules of Court. The defendants contended that they only became aware on 11 November 2024 that the plaintiffs were asserting the plea to be defective for this reason. The defendants submitted that *Fortune*,⁹ as referred to by the plaintiffs, is not applicable in this Division, and that the binding authority is the judgment in *Forensic Data Analysts (Pty) Ltd*,¹⁰ where the Court held that the rules do not require the attorney to sign twice.

[20] In the alternative, the argument continued, the plaintiffs should be deemed to have condoned the non-compliance with Rule 18(1) since they took further steps after the plea was served.

[21] The plaintiffs submitted that the judgment in *Forensic Data Analysts (Pty) Ltd* is distinguishable as the summons in that case was signed by an advocate, not the attorney. The plaintiffs' counsel persisted that the Court should, therefore, follow the judgment in *Fortune*.

[22] Furthermore, the steps taken in instituting the summary judgment application including the notice to oppose the application for leave to amend and the subsequent pleadings exchanged should not be construed as steps forward.

[23] I had regard to the provisions of Rule 18(1) and it requires that pleadings be signed by the party alternatively by the advocate and the attorney, or an attorney bestowed with a Right of Appearance in the High Court as contemplated in section 25(3) of the Legal Practice Act 28 of 2014.¹¹ Non-compliance may be considered irregular,¹² and the guilty party may approach

⁹ *Fortune v Fortune* 1996 (2) SA 550 (C). This judgment was also referred to with approval in *Mzontsundu Trading (Pty) Ltd and Another v Lavelikhwezi Investments (Pty) Ltd and Another* [2021] ZAECMHC 44.

¹⁰ *State Information Technology Agency SOC Ltd v Forensic Data Analysts (Pty) Ltd* [2023] ZAGPPHC 1159.

¹¹ A combined summons must be signed by an advocate and attorney, alternatively in the case of an attorney with right of appearance in the High Court, (Supreme Court of Appeal or the Constitutional Court), only by such attorney.

¹² See Rule 18(12) of the Uniform Rules of Court.

the Court in terms of Rule 27(3) for condonation, while the innocent party may bring an application in terms of Rule 30.

[24] It is noted that the essence of the provisions of Rule 18(1) is to ensure that, where a litigant is represented in the High Court, the pleadings must be signed by an advocate and an attorney in instances where the latter has no Right of Appearance in the High Court. However, where such an attorney has the Right of Appearance in the High Court, only the attorney should sign. There is no requirement for two signatures if the attorney has Right of Appearance. The decision in *Fortune*, which was quoted with approval in *Mzontsundu Trading (Pty) Ltd*,¹³ appear not to derive its foundation from Rule 18(1) of the Uniform Rules of Court, as the latter is specific that two signatures are required only where the attorney has no Right of Appearance in the High Court, in which case the attorney must sign together with an advocate.

[25] In this case, the attorney who has the Right of Appearance has signed the pleadings on behalf of the defendants. Deferring to the findings in *Fortune* would be to place undue emphasis on formality over substance. The converse would be true if the attorney acting for the party is not the same attorney who is signing in terms of his/her Right of Appearance in the High Court. To the extent that *Fortune* insinuates that the requirement for two signatures may be derived from Rule 18(1), appears to be incorrect.¹⁴ Accordingly, the contention that the absence of the second signature is a fatal defect is unsustainable and is bound to fail.

[26] Even if the above finding is found wanting, the defendants correctly contended that the plaintiffs' conduct — namely, launching an application for summary judgment — constitutes a step that advances the matter toward finality. "A further step in the cause is some act which advances the proceedings one stage near completion". Once application for summary judgment

¹³ n 10 above.

¹⁴ In any event the decision in *Fortune* was delivered before the amendment of the subrule which took effect from 1 July 1996. See commentary in Erasmus, *Superior Court Practice*, at D1 Rule 18-6. See also Harms, *Civil Procedure in the Superior Courts*, "Rule 18 as amended as from 1 July 1996. This amendment supersedes *Fortune v Fortune* 1996 (2) SA 550 (C), [1996] 2 All SA 128 (C) which sets out the Cape Practice". See also Binns-Ward J in *Absa Bank Ltd v Barinor New Business Venture (Pty) Ltd* 2011 (6) SA 225 at para 13 where he stated that: "Prior to the substitution of rule 18(1) of the Uniform Rules that gave rise to the oddity that attorneys exercising the rights conferred by s 3(4) of the Act had to sign the pleading twice, once in discharge of the prescribed function of the advocate and again in discharge of the prescribed function of the attorney – see *Fortune v Fortune* 1996 (2) SA 550 (C); [1996] 2 All 128".

is adjudicated and an order is granted, the litigation effectively concluded, with the issuance of the application for summary judgment marking a further step toward finality.

[27] Conversely, a summary judgement application can only be launched where an effective plea has been delivered. The plaintiffs accepted and condoned the alleged defect in the plea and instituted the summary judgment application. Accordingly, the contention that the plea is defective remains unsustainable.

[28] In the premises, I conclude that the plea was not defective; consequently, the defendants were not required to have filed the plea signed twice by the attorney, nor was the application for condonation required.

Application to strike out.

[29] The plaintiffs' application to strike out is based on the contention that the plea served on 26 December 2024 should be struck out. Further, that the application for condonation for non-compliance with Rule 28(4) served on 20 December 2024 be struck out.

[30] The plaintiffs contend that the directive I issued expressly set out the documents to be delivered on 20 December 2024, as indicated in the case management directive of 26 November 2024 and during the subsequent meeting on 13 December 2024. The directive referred specifically to the heads of argument for (i) the application for leave to amend dated 31 March 2023, (ii) the application for leave to amend dated 11 April 2024, and (iii) the point of law concerning the status of the first action under case number 009661/2022.

[31] The plaintiffs contend that the defendants' affidavit, delivered without a request for condonation, and the accompanying documents, which were served in breach of the Commercial Court's directives, should be struck out.

[32] The purposes of referring matters to the Commercial Court includes the expeditious finalisation of disputes. The presiding judge has the power to make decisions with due regard to speed, cost-effectiveness, fairness, and legal acuity, without blind allegiance to formalism. The non-compliance with the directives did not prejudice any of the parties, particularly since

both parties requested condonation for non-compliance with the rules. To this end, the application to strike out is bound to fail.

[33] The plaintiffs' second reason for the application to strike out is based on the contention that the delivery of a rectified plea by the defendants constitutes an acknowledgment that the plea delivered on 26 September 2022 was defective and therefore *pro non scripto*. Accordingly, since that plea was delivered after the notice of bar was served, the defendants were under bar and had to apply for the upliftment of the bar before serving a rectified plea. In view of my finding above, the plea served on 26 September 2022 is not defective and the defendants did not need to serve a rectified plea and/or seek condonation.

[34] The plaintiffs further contend that the request for condonation for serving the application for leave to amend on 4 April 2023 should be dismissed. In this regard, the defendants submitted that the last day to serve the application for leave to amend was 31 March 2023. The application was finalised and uploaded on CaseLines on that date, and proof thereof was attached. However, it only became apparent to them on 4 April 2024 that the application had not been served on the plaintiffs, whereupon the defendants immediately proceeded to serve it. The defendants further submitted that, once documents are uploaded to CaseLines, all participating parties receive notification. Since the plaintiffs had been invited to CaseLines, they would have received notification of the uploaded notice. Accordingly, no prejudice was suffered by the plaintiffs. Moreover, the delay and any attendant prejudice, if any, were never raised as an irregular step by the plaintiffs, who proceeded to serve their answering affidavit.

[35] The delay was not inordinate, and no prejudice was suffered by the plaintiffs. I therefore concluded that the delay should be condoned.

[36] The plaintiffs further contend that condonation for the late service of the replying affidavit in relation to the second application for leave to amend should be struck. I have found below that the first action is partly abandoned, accordingly, this issue attracts a debate of no practical value.

[37] In view of my finding above, the application to strike out is incompetent.

[38] The parties raised a point of law by agreement requiring the Court to determine the status of the first action. The defendants contended that, after the plaintiffs launched the second action under case number 2023-123503, it became apparent that both actions could not co-exist. Reference was made to certain paragraphs in the second action, in which the plaintiffs indirectly acknowledged that the first action had been abandoned.

[39] The plaintiffs assert that it was never their intention to withdraw or abandon the first action. However, they concede that of the 13 claims filed against the defendants, only 5 are affected by the non-payment and cancellation of the agreement or the success in arbitration. The remaining claims do not depend on the rescission of the judgment obtained by the liquidators against Vestacor and can be adjudicated independently. These claims are based on misappropriation of trust funds, delict and inducement to enter into the contract. The claims linked to the success or conditions of arbitration remain extant solely for the purpose of costs.

[40] The plaintiffs stated in the heads of argument that "... claims in the causes of actions to Parts A1, A2, B1 and B2 of the particulars of claim are now stillborn as they relate to breach for non-payment...".¹⁵ Further that the claims which are based on the misappropriation of funds, delict and inducement to enter into the agreement, should remain intact and will proceed.

[41] The defendants did not vigorously contest the assertion that not all claims were abandoned when the Court inquired whether defendants accept the plaintiffs' concession that only limited claims are implicated meant that those would not be proceeded with. Accordingly, I conclude that the claims based on non-payment and/or success of arbitration have been abandoned, as stated by the plaintiffs, except that the parties will argue costs at a later stage.

[42] Accordingly, the contention that all the claims have been waived is unsustainable, as the claims based on delict, misappropriation of funds, and inducement to contract can co-exist with claims under the plaintiffs' second action.

¹⁵ See para 197.2 of the plaintiffs' heads of argument. The plaintiffs further stated at para 197.3 that "... the prayers 2 to 7 and 9, with those of 3 and 4 only in part, are now moot, as they relate to the claims for non-payment to the security as to costs agreement...".

Leave to Amend

[43] It is trite that any party may amend a pleading or document at any stage before the judgment,¹⁶ and a party may object by clearly and concisely setting out the grounds upon which the objection is based.¹⁷

[44] The defendants contended that they have noted some aspects in their plea requiring clarification of confusion or conflict and have therefore delivered a notice to amend. The defendants' counsel submitted that there were no withdrawals of admissions, as alleged by the plaintiffs. These were clearly explained, argument continued, in a letter forwarded to the opponents, which was attached to the founding affidavit supporting the applications for leave to amend, marked FA 3.

[45] In opposing the application for amendment, the plaintiffs contended that the proposed amendments fall foul of the law, as it includes the withdrawal of admissions. They further argue that, once the amendments are allowed, the plea would be susceptible to exception and that contradictions would arise.

[46] It should be noted that since the claims premised on non-payment and success in arbitration (abandoned claims) are abandoned, any proposed amendment by the defendants or any objection to the amendment which I find to be linked to the abandoned claims deserves no further attention or consideration. Such that even if leave is granted or the objection is sustained, no purpose would be served in giving effect thereto, except that it may be relevant for arguments regarding the costs of the abandoned claims.

[47] The bases of the plaintiffs' objections are addressed hereunder, *ad seriatim*. It is noted that the defendants, upon realising that their notice to amend did not include an offer for costs occasioned by the intended amendment, proceeded to tender same. As such, where the objection was based on the lack of an offer for costs in the notice of the intention to amend, it will not be considered.

¹⁶ Rule 28(1) of the Uniform Rules of Court.

¹⁷ *Id.*

[48] Paragraph 13.5.6 of the plea reads as follows:

“[A]ny funds of the securities remaining after the taxation of costs were to be returned with the taxed amount being held in trust.”

The intended amendment reads as follows:

“Repayment of the security funds advanced as well as any loans advanced were subject to the following: ‘we confirm that the loans and costs will be returned either through the attainment of a successful judgment of the Mutual and Federal matter (aqua) and/or part by the release of the guarantee for fees if successful in the Genesis matter, whichever is the soonest.’”

[49] The proposed amendment aligns with the plaintiffs’ email marked POC 24 (“the email”) which sets out the conditions for repayment. Accordingly, the objection is unsustainable. To the extent that these conditions are not correctly interpreted, that would be a matter for evidence.

[50] The second reason for the objection was that the amendment would cause an injustice that cannot be remedied by an order for costs. However, the basis of this objection is unclear and may only be fully developed during evidence. *Ex facie* the proposed amendment, there is no apparent prejudice, and as mentioned above, its essence aligns with the plaintiffs’ email referred to above. Since the amendment does not cause any prejudice to the plaintiffs, this objection need not be entertained further.

[51] A further contention that the intended amendment would prejudice the plaintiffs in their summary judgment application is unsustainable, as the plaintiffs would not ordinarily be precluded from supplementing the summary judgment application¹⁸ or withdrawing and submitting a fresh application in light of the amended plea. Furthermore, the costs associated with the amendment have been tendered.

¹⁸ The defendants stated that, at the time the summary judgment application was postponed, it was their understanding that the plaintiffs would be entitled to supplement their papers.

[52] The contention that the defendants were aware of the facts at the time of the plea cannot constitute a valid objection absent cogent substantiation. A party may amend its papers at any time before judgment, provided there is proper motivation and a tender for costs.

[53] The tenor of the proposed amendment and the accompanying objection is undermined by the concession that claims based on non-payment and success in arbitration will not be pursued.

[54] Paragraph 13.5.7 of the plea reads as follows:

“[O]n the ruling of the arbitrator in the arbitration in respect of costs, the security funds will either be used for taxed costs orders to the extent that the finding was in favour of Genesis or returned if the finding was in favour of KNS.”

The intended amendment reads as follows:

“A successful judgement whether in the Mutual and Federal matter or in the Genesis matter was not and cannot be attained. In the circumstances, the amounts advanced by the plaintiffs are not payable.”

[55] In their letter (marked FA3), the defendants stated that clarification was necessary, rendering the objection unsustainable. In any event, it is common knowledge among all parties that the KNS arbitration was not successfully completed. There is, therefore, no prejudice to the plaintiffs. The other reasons I set out regarding the objection to the amendment of para 13.5.6 remain applicable.

[56] The objection is also unsustainable when considered alongside the plaintiffs’ email, which clearly sets out the conditions precedent to the payments due to them. In any event, both the proposed amendment and the objection are affected by the concession that certain claims will no longer be pursued.

[57] Paragraph 13.8 of the plea states that:

“The defendants deny that any funds provided to KNS as securities by the plaintiffs have become repayable in that the funds securities have to be utilised to pay taxed cost orders given against KNS in the arbitration. In such an event only any balance left in respect of the funds advanced (if any) would become repayable.”

The intended amendment reads as follows:

“The defendants deny that any funds provided to KNS whether as security or loans, have become repayable.”

[58] The defendants have denied that the funds are refundable and provided reasons for this in their plea whereas the proposed amendment does not include any such reason. According to the conditions set out in the letter, the defendants appear to suggest that these conditions have not been met.

[59] The objection is unsustainable, as the proposed amendment seeks to clarify that the conditions for repayment have not been met. Furthermore, the proposed amendment is affected by the abandonment of certain claims.

[60] Paragraph 14.3 of the plea provides:

“Despite a successful judgement having been obtained as suggested in this paragraph, all taxed costs incurred and all payments to be made in terms of suretyships provided by the directors of the fourth defendant, had to be covered before repayment of the security funds.”

The intended amendment reads as follows:

“KNS failed to obtain successful judgement as suggested in this paragraph, KNS obtained a judgement by default against an entity known as Vestacor Limited (in liquidation) in the above Honourable Court and not in an arbitration. This judgement was, however, rescinded and it is not extant.”

[61] The explanation provided was that the amendment aimed to correct an error, namely the statement that a successful judgment had been obtained, which was inaccurate since the judgment was ultimately rescinded. There appears to be no prejudice to the plaintiffs.

[62] Additionally, both parties are aware that the default judgment was rescinded, and the plaintiffs have conceded that claims based on the existence of the default judgment are bad in law as the judgment was rescinded.

[63] Paragraph 15.1 of the plea states that:

“The defendants deny that a successful judgement was issued, whether in the arbitration or by the High Court of South Africa, Gauteng Division, Johannesburg.”

The intended amendment reads as follows:

“The defendants deny that a successful judgement was issued, whether in the arbitration or by the High Court of South Africa, Gauteng Division, Johannesburg. The defendants repeat the allegations set out in paragraph 14.3 above.” (Own emphasis.)

[64] There is no prejudice in this proposed amendment, considering I have already found nothing untoward in the suggested amendment. Furthermore, the concession regarding the waiver of claims based on non-payment renders the related contentions academic.

[65] Paragraph 15.4 of the provides:

“The defendants deny that they repudiated the security for costs agreement and that the plaintiffs were entitled to cancel the agreement.”

The intended amendment reads as follows:

“The first to third defendants deny that they repudiated the security for costs agreement and that the plaintiffs were entitled to cancel the agreement with KNS.”

[66] There appears to be no admission being withdrawn, and no prejudice to the plaintiffs is apparent. The amendment seeks to clarify the parties to the agreement. It should be easy to prove whether the fourth defendant concluded the agreement, unless the plaintiffs contend otherwise. There is nothing specific in the notice of objection. A concession on the waiver of other claims may be applicable here.

[67] The defendants seek to add the following paragraph as paragraph 15.5:

“The defendants deny that the plaintiffs concluded any funding agreement with the fourth defendant.”

[68] As with paragraph 15.4, the defendants contend that the fourth defendant did not contract with the plaintiffs. There is no evidence of prejudice that cannot be addressed by an order of costs.

[69] The defendants seek to add the following paragraph as paragraph 15.6:

“The defendants plead that the plaintiffs acted in breach of the security funding agreement with KNS in that it failed to continue to fund or provide security for costs of the arbitration between KNS and Genesis.”

[70] The addition causes no harm, and the other reasons advanced in the proposed amendment are applicable here. This has been rejected by the plaintiffs and will therefore be a matter for evidence.

[71] The defendants seek to insert the following paragraph as a new paragraph 16.2 with the existing paragraphs being renumbered accordingly:

“The defendants deny that the amount of R500 000.00 was to be kept in trust by the fourth defendant and plead that this aggregate amount was paid over by the plaintiffs and by the fourth defendant to defray costs in the arbitration.”

[72] There are no clear reasons for the objection, and the reasons set out above apply. The defendants stated that all payments were made in consultation with the plaintiffs, and this will

be a matter for evidence to be led at trial. Additionally, the defendants aver that since the plaintiffs cancelled the agreements, further costs were to be defrayed from available funds in trust.

[73] The defendants also seek to add the following new paragraph after 16.4, to be numbered 16.5:

“The defendants plead that the amounts of money made available and referred to in paragraphs 66.4, 66.5 and 66.7 were made available for the purposes of defraying costs in the arbitration and not to provide security funding.”

[74] There are no persuasive reasons for objecting to this proposed amendment, and the reasons set out above apply. The amount intended for security for the costs was ring-fenced and totalled R1 million. The fact that this amendment introduces a dispute of facts is not a valid reason to refuse the leave to amend.

[75] The defendants seek to add the following new paragraph after 26.1, to be numbered 26.2:

“At all times material hereto the first to third defendants acted in accordance with the agreements concluded by KNS with the plaintiffs.”

[76] No persuasive reasons have been provided to object to this intended amendment.

[77] The defendants seek to add the following new paragraph after 27.1, to be numbered 27.2:

“At all material times hereto the first to third defendants acted in accordance with the agreements concluded by KNS with the plaintiffs.”

[78] No persuasive reasons have been provided to justify the objection to this proposed amendment. The suggested amendment is also related to the concession of waiver regarding claims based on non-payment and success in arbitration.

[79] The defendants seek to add the following new paragraph after 29.2, to be numbered 29.3:

“At all times material hereto, KNS, and not the plaintiffs, was the client of the fourth respondent.”

[80] No persuasive reasons have been provided to object to this intended amendment.

[81] The defendants seek to add the following new paragraphs after 30.13 and 33.1, to be numbered 30.14 and 33.2, respectively:

“The defendants deny, specifically, that annexure “POC29” constitutes a correct reconciliation and put the plaintiffs to the proof thereof.”

...

“The defendants deny that any amount related to the funding provided by the plaintiffs is due, owing and payable to the plaintiffs.”

[82] No specific reasons have been provided to object to this intended amendment. The defendants’ case appears to be that the refund to the plaintiffs was subject to conditions that have not been met. This understanding of the conditions aligns with the email from the plaintiffs outlining when payments would be made.

[83] The defendants seek to add the following new paragraph after 36.2, to be numbered 36.3:

“The defendants plead that the conditions stipulated in the agreement of 12/13 January 2016 are applicable to the bridging finance agreement. Accordingly, no repayment is due or owing without compliance with those conditions.”

[84] The effect of the amendment is not intended to frustrate the object of the claim based on the misappropriation of funds of the section 86(4) trust account. This may not be a valid ground for objection, as the defendants may raise any defence and will be required to prove same at the hearing of the matter. The fact that the plaintiffs may lose the case if the amendment is allowed is of no moment, as the defendants' defence is any way aimed at defeating the plaintiffs' claim.

[85] Other aspects of the plaintiffs' heads of argument refer to the following as grounds for their contention that the proposed amendments should not be granted:

Excipiability of the plea

[86] The amendments would be excipiable as they introduce contradictions and vagueness if leave to amend is granted. No basis has been pleaded to support the contention that contradictions would arise if the amendment were allowed. In any event, an exception will be upheld where it disposes of the whole or part of the pleading. As mentioned above, the concession of waiver permeates most of the plaintiffs' objections, and these objections would become academic in claims based on the agreements between the parties.

Trust account

[87] The amendment, which allows the funds in trust to be applied to arbitrators' fees without proper authority, it is argued, is intended to frustrate the claim based on the misappropriation of trust funds, now part of the summary judgment application. If allowed, this amendment would be excipiable on the grounds of being vague, embarrassing, and contradictory to the existing plea, where such terms were acknowledged. The objection is undermined by defendants' allegations that payments were made after consultations with the plaintiffs and as a result of breaches of the agreement between the parties. Therefore, the matter would be one for evidence to prove.

Contradictions.

[88] The plaintiffs further contend that a contradiction would arise if the amendment regarding the correct date of rescission is allowed. This argument is based on the assertion that the defendants have failed to amend paragraph 15.2 of the plea, which still refers to the alleged incorrect date of 14 January 2022, instead of 21 July 2021. However, as stated above, the plaintiffs have acknowledged the correct date and conceded that the claims are bad in law, meaning that the issues concerning the rescission date and its impact on specific claims are no longer live issues. Therefore, this contention serves no purpose, and in any event, it is not linked to any averments in the plea targeted by the notice of intention to amend.

Prejudice not capable to compensation by costs order.

[89] The defendants have stated that success was achieved, and as explained in the affidavit resisting summary judgment and in the annexures to the notice of amendment, the position has changed in light of the court orders in the Genesis and Mutual and Federal matters. The defendants aver that the cases had reached their conclusion, and that litigation came to an end. If this is indeed the case, it will need to be proved at trial, and it may serve as a valid defence to the plaintiffs' claim.

[90] The plaintiffs should be entitled to the costs associated with the amendments and any prejudice suffered as a result of the amendments, once liability is proven and quantified. The amendment cannot be rejected on the basis that it would defeat the plaintiffs' claim, including the possible success in the summary judgment application.¹⁹ Any damages arising from the amendment that cannot be compensated by an order of costs should be eligible for compensation once liability and quantum are proven. This should also cover damages resulting from the cancellation of the agreement concerning security for costs, following the defendants'

¹⁹ The plaintiff averred that defendant's assertion that the success resulting from the judgment against Vestacor does not constitute success for the purposes of the Genesis arbitration raises a dispute of fact, which may frustrate the granting of a summary judgment against the defendant. Furthermore, the cancellation of the agreement on 15 August 2021, prior to the rescission on 14 January 2022, should be considered valid. If this is altered through the amendment, no cost order would sufficiently compensate for the prejudice suffered or to be suffered by the plaintiffs.

misstatement that the judgment meant to trigger payment had been rescinded. In any event, the plaintiffs have already sought a declaratory order for the loss suffered due to the misstatement.

Hearsay evidence

[91] The plaintiffs contend that Annexure FA3, attached to the application for leave to amend, constitutes hearsay evidence due to the lack of confirmation from the author. However, the content of the email is intended to explain the essence of the proposed amendment in response to the plaintiffs' notice of objection. The email's contents do not, in and of themselves, serve as evidence for the amendment, but are included solely to elaborate on the objections.

[92] The defendants referred to the Constitutional Court judgment in *Tjiroze v Appeal Board of the Financial Services Board*,²⁰ where it was stated that prejudice does not refer solely to the denial of a procedural advantage, but may also include the prospects of success in a matter:

“The subtext is that an amendment will result in him losing that advantage; and that is what would cause him ‘prejudice’. That, of course, has never been our law on what constitutes prejudice of the nature that may result in an amendment being denied. Prejudice that may lead to the refusal of an amendment is not about the mere loss of procedural advantage or even the possibility of losing the case itself as a result of the grant of the amendment. The norm is always to grant an amendment if it will not cause the other side an injustice that is incapable of being compensated by an appropriate award of costs.”²¹

[93] Having addressed the issues in the above paragraphs, any other issue raised is peripheral and would not tilt the scale in the plaintiffs' favour. They therefore deserve not to detain this Court any further.

²⁰ [2020] ZACC 18; 2021 (1) BCLR 59 (CC).

²¹ *Id* at para 26.

Conclusion

[94] It follows that the status of the first action is that the claims predicated on misappropriation of funds, inducement to contract, and delictual claims remain extant, whereas claims relating to non-payment and the success of arbitration will not be pursued, except for cost.

[95] The alleged defect in the defendants' plea dated 26 September 2022 is unsustainable. The plea remains effective, and there was no need to deliver a rectified plea signed twice by the defendants' attorney, nor was condonation required for the late filing thereof.

[96] The second application for leave to amend does not merit further attention, as the finding on the point of law addresses the matter.

Costs

[97] The parties have agreed that the costs should be reserved.

Order

1. It is declared that claims in the first action are abandoned, except for the claim for costs related thereto and claims predicated on misappropriation of funds, delict, and inducement to enter into a contract.
2. It is declared that the defendants' plea dated 26 September 2022 is valid and effective.
3. The application for condonation of the defendants' non-compliance with Rule 28(4) of the Uniform Rules of Court is granted.
4. Leave to amend the plea dated 31 March 2023 is granted.
5. Leave to amend the plea dated 11 April 2024 is struck off the roll.
6. The application for condonation for the short service of the application to strike out is granted.
7. The plaintiffs' application to strike out is dismissed.
8. Costs are reserved.



M V NOKO
Judge of the High Court
Gauteng Division, Johannesburg

DISCLAIMER: This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 18 March 2025.

Date:

Hearing: 27 January 2025.

Judgment: 18 March 2025.

Appearances:

For the Plaintiffs : STH Saunders, Trust Account Advocate in terms of section 34(2)(b) of the Legal Practice Act 28 of 2014.

For the Defendants: MvR Potgieter SC
Instructed by: Senekal Simmonds Inc.