

REPUBLIC OF SOUTH AFRICA



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

Case No: 2023/035089

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED: YES

3.04.2025

DATE

[REDACTED]

SIGNATURE

In the matter between:

**THE INDUSTRIAL CORPORATION
OF SOUTH AFRICA**

Plaintiff

and

MARA CORPORATION LIMITED

First Defendant

MARA PHONE LIMITED

Second Defendant

MARA PS LIMITED

Third Defendant

ASHISH JAGDISH THAKKAR

Fourth Defendant

AHUTI CHUG

Fifth Defendant

JAGDISH CHANDRA DULLABHJI

Sixth Defendant

THAKKAR

SARLA JAGDISH THAKKAR

Seventh Defendant

JUDGMENT

SIWENDU

Introduction

[1] This is an application seeking to amend a plea delivered by the defendants in an action (the main action) instituted by the plaintiff, Independent Development Corporation (the IDC), against the defendants.

[2] The first three defendants are Mara Corporation Limited, Mara Phones Limited, Mara PS Limited. They are companies registered in Mauritius. The remaining four defendants are Ashish Jagdish Thakkar, Ahuti Chug, Jagdish Dullabhji Thakkar and Sarla Jagdish Thakkar. Their chosen *domicilium citandi et executandi* is Mara Phones South Africa (Pty) Limited (Mara Phones SA), Lynnwood Bridge, 4 Daventry Street, Lynnwood Manor, Pretoria. I refer to them as the defendants consistent with the reference to them in the main action.

[3] The background to the application is that in December 2018, the IDC entered into a loan agreement (the loan) with Mara Phones SA, (the borrower) and advanced an amount of R205 973 000.00 (Two Hundred and Five Million, Nine Hundred and Seventy-Three Thousand Rands) for the construction of a smart phone manufacturing facility at the Dube Trade Port in KwaZulu Natal, South Africa. It is common cause that Mara Phones SA defaulted and breached its payment obligations on the loan.

[4] The IDC alleges that at the time, the total amount owed by Mara Phones SA was R 231 424 272.57 (Two Hundred and Thirty-One Million, Four Hundred and Twenty-Four Thousand, Two Hundred and Seventy-Two Rands and Fifty-Seven cents). Consequently, the IDC obtained a judgment against Mara Phones SA on 7 June 2021 before the Local Division of the High Court, KwaZulu- Natal. After the judgment, Mara Phones SA was placed in voluntary business rescue.

[5] Although the defendants deny knowledge of payment, the IDC confirmed that it received, an amount of R 1,983,491.12 (One Million, Nine Hundred and Eighty-Three Thousand, Four Hundred and Ninety-One Rands and Twelve cents)

from the business rescue practitioner as a partial settlement of its claim against Mara Phones SA. It alleged that its rights to its security were not affected by the conclusion of the business rescue plan. That dispute would be for the trial court to resolve to the extent persisted with.

[6] In addition to the loan, on 22 July 2019, the IDC and the defendants concluded a Guarantee Facility Agreement (the Guarantee) as continuing covering security for the borrower's loan obligations. The IDC instituted the main action against the defendants in their capacity as Guarantors, to recover the sum of (a) R 165 851 673.91; (b) R 40 934 688.68; and (c) R 8 096.33 based on the Guarantee. Mara Phones SA is not a party to the main action and this application.

[7] The IDC alleges that the defendants as Guarantors undertook that each time a guarantee claim notice is delivered to the Guarantor, the Guarantor shall within 3 (three) business days after receipt thereof pay all sums claimed in such guarantee claim notice. The Guarantee defined Guaranteed liabilities covered under it as:

" all present and future money and liabilities (whether actual or contingent or whether owed jointly or severally or in any other capacity whatsoever), which are now or which may hereafter become, owing by the Borrower to IDC in terms of the Finance Documents together with all damages and all costs, charges and expenses incurred by IDC in connection with a breach by the Borrower of its obligations under the Finance documents and which [the] IDC is entitled to recover from the Borrower in terms of the winding-up, absence of legal personality or incapacity of the Borrower or any statute of limitation and reference to "Guaranteed Liability" shall be to any one or more of the "Guaranteed Liabilities" as the context requires "

[8] The defendants opposed the action. Amongst the defences raised was one of an oral misrepresentation made by "the Presidency" of the Republic of South Africa. The defendants alleged they had been induced to conclude "the agreements", including the Guarantee. Part of the term of the misrepresentation relied on was that:

“the defendants would not be called upon to pay for any losses suffered by the enterprise should such enterprise fail.”

[9] The IDC excepted to the defendants’ plea. On 19 March 2024, Loxton AJ (the exception court) upheld the exception and dismissed the defendant’s plea on the merits, but granted the defendants leave to amend their plea, if they so wished. The present application is a sequel to the judgment upholding the exception.

[10] The defendants submit they seek “to supplement their misrepresentation-based defence with a defence of rectification.” As will be seen, they seek to introduce certain terms to the written Guarantee which they claim reflect the “common intention of the parties” allegedly omitted on grounds of a “common error and bona fide mistake.” [Emphasis added]

[11] The IDC opposed the amendment on several grounds evident from (a) the notice of objection and (b) the answering affidavit. It simultaneously delivered a Notice in terms of Rule 6(5) (d) (iii), which it attached as an annexure to the answering affidavit. The approach was attacked by the defendants on the grounds it is confusing, and the points raised in notice of objection and the answering affidavit do not correlate with all the grounds of objection. The defendants complained that the objection does not comply with Uniform Rule 28 (3) which requires an objector to clearly and concisely state the grounds upon which the objection is founded.

[12] However, when read together the notice of objection and the answering affidavit clearly sets out why:

- i. The amendment does not set out a viable defence and introduce triable issues and is vague. Both explain several the grounds for this complaint.
- ii. It would render the pleading excipiable and the affected contract unenforceable.

- iii. The amendment is *mala fide*, brought to overcome the criticism levelled at the defendants at the exception hearing.
- iv. The IDC would be prejudiced if the amendments were allowed.

As I read it, the point of law raised is linked with the excipiability complaint and is dealt with in the answering affidavit. The above complaints are clearly discernible and stand with or without the Rule 6 (5) (d) (iii) Notice. The defendants are not prejudiced in any way.

The Amendment

[13] The defendants seek the following amendments:

By deleting paragraphs 30.1 to 30.7 of the Plea and inserting paragraphs 28A.1 to 28A.7 in place thereof.

28A. Prior to signature of the Guarantee Agreement:

28A.1 In or about September 2018 while attending a United Nations General Assembly meeting in New York, the President of the Republic of South Africa, the Honourable Mr Matamela Cyril Ramaphosa and other members of the office of the Presidency (together "the Presidency"), met with the fourth defendant.

28A.2 At all relevant times, the fourth defendant represented the Mara Group, including the defendants.

28A.3 The Presidency knew that the fourth defendant was the CEO of the Mara Group, an international group of companies (including the first, second and third defendants) whose business was the manufacturing of smart phone devices in emerging markets, including Rwanda.

28A.4 At the meeting in New York in September 2018 and in subsequent telephone calls with the Presidency in or about September and October 2018, the Presidency and the fourth defendant orally agreed that the Mara Group would establish a Mara smart phone device manufacturing facility in South Africa ("the enterprise").

28A.5 The fourth defendant was advised by the Presidency that in establishing the enterprise the Mara Group would deal with and co-fund the enterprise with (at least)

the plaintiff, a state-owned enterprise, whose mandate was and is as described in paragraph 9 of the particulars.

28A.6 In meetings in Johannesburg and in telephonic discussions in or about October, November and December 2018, the fourth defendant negotiated with Ms Moseketsi Mpeta and her team on behalf of the plaintiff the terms of the establishment of the enterprise.

28A.7 Such terms included the oral representation by both the Presidency and the plaintiff in meetings and telephonic discussions with the fourth defendant as aforesaid that the plaintiff and/or the South African government would provide whatever support was required to ensure that the enterprise succeeded (including maintaining the employment of its employees and revitalizing the Dube Trade Port in KwaZulu-Natal, where the enterprise was to be built) and that, accordingly, the defendants would not be called upon to pay for any losses suffered by the enterprise should the enterprise fail by reason of the plaintiff's failure to provide whatever support was required to ensure that the enterprise succeeded ("the representation").

28A.8 The defendants, represented by the fourth defendant, accepted the representation with the consequence that it fell to be recorded in the agreements, and in particular in the Guarantee Agreement.

28B. The Guarantee Agreement does not correctly record the agreement between the parties in that it fails to reflect the term of the parties' agreement in consequence of the defendants' acceptance of the representation in that it:

28B.1 failed to qualify the defined term "Guaranteed Liabilities" by including in the sixth line, after the words "Finance Documents," the words "save in so far as such present and future liabilities may now or may hereafter become owing in consequence of the IDC's failure to provide whatever support is required to ensure that the Borrower succeeds in the conduct of its business and the Project"; and

28B.2 failed to include among the defined terms "Project" as "shall bear the meaning ascribed to that term in the Loan Agreement".

28C The incorrect records set out in paragraph 28A above were occasioned by a common error of the parties and the parties signed the Guarantee Agreement in the bona fide but mistaken belief that it recorded the true agreement between the parties.

28D The defendants hereby demand rectification of the Guarantee Agreement to confirm with the common intention of the parties and request the Court in any event to adjudicate upon the basis of the Guarantee Agreement rectified as set out above.

1. By deleting the words 'aver' that after the word 'defendants' in line two of paragraph 30.
2. By inserting after paragraph 30.8 the following new paragraph:

30.8A In consequence of the representation the defendants were misled as to the terms of the Guarantee Agreement. They did not reasonably expect that the Guarantee Agreement would impose obligations to meet losses suffered by the enterprise, should the enterprise fail by reason of the plaintiff's failure to provide whatever support was required to ensure that the enterprise succeeded.

3. By inserting the following after the word 'concluded' in line three of paragraph 30.11:

in particular, the defendants would not have concluded the Guarantee Agreement which defined "Guaranteed Liabilities" without qualification to impose obligations to meet losses suffered by the enterprise should it fail by reason of the plaintiff's failure to provide the enterprise with the necessary financial and other support it required.

4. By inserting the following new paragraph:

30.14 The circumstances which now pertain and have given rise to the plaintiff's claim are a consequence of the plaintiff's failure to provide the enterprise with the necessary financial and other support it required.

5. By inserting the following after the word 'agreements' in line two of paragraph 31.1 and the following:

31.1 there was no consensus between the parties in concluding the agreements, particular the Guarantee Agreement which:

31.1.1 defined "Guaranteed Liabilities" without qualification to impose obligations to meet losses suffered by the enterprise should it fail by reason of the plaintiff's failure to provide the enterprise with the necessary financial and other support it required, and

31.1.2 failed to qualify the defined term "Guaranteed Liabilities" by including in the sixth line, after the words "Finance Documents," the words "save in so far as such present and future liabilities may now or may hereafter become owing in consequence of the IDC's failure to provide whatever support is required to ensure that the Borrower succeeds in the conduct of its business and the Project";

31.1.3 failed to include among the defined terms "Project" as "shall bear the meaning ascribed to that term in the Loan Agreement".

6. By adding, a subparagraph 31.2, which would begin with the word 'there' in the original plea in line two of paragraph 31.
7. By inserting the words 'the effect' after the words 'agreements and' in line two of paragraph 31.2 mentioned above.
8. By inserting the following after the words 'their terms' in line two of paragraph 31.2 mentioned above:

in particular the Guarantee Agreement in the circumstances which now pertain
9. By inserting the following after the word 'agreements' in paragraph 32:

and, in particular, the Guarantee Agreement - which imposed obligations to meet losses suffered by the enterprise should it fail by reason of the plaintiff's failure to provide the enterprise with the necessary financial and other support it required,
10. By deleting the word 'which' after the word 'agreements ' in paragraph 32.
11. By inserting the following before the words 'were therefore' in paragraph 32:

with the consequence that the agreements, and in particular the Guarantee Agreement
12. By deleting the remainder of paragraph 33.1 after the word 'representation' herein.
13. By inserting the word 'breach' after the word 'such' in paragraph 33.2.

14. By deleting the word 'failure' before the words 'in itself' in paragraph 33.2. 17.
By inserting the following after the word 'agreements' in paragraph 33.4: in particular the Guarantee Agreement.”

[14] The parties rightly do not hotly contest how a court should approach an amendment as the principles are well established. Nevertheless, the starting point is the purpose of an amendment, to assist clarify a pleading which insufficiently or imperfectly sets out the original cause of action.¹ Ultimately, an amendment must contribute to the determination of the real issues between the parties and to their proper ventilation.

[15] The defendants lean on the benevolent approach adopted by the Court to amendments. That view was endorsed by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Another*² (*Affordable Medicines Trust*). It is uncontested that latitude extends to instances where a new cause of action is introduced. A court may also grant the amendment in a form different from what was applied for.³

[16] Nonetheless, the privilege to amend a pleading is not unqualified. It will be disallowed if the application is *mala fide* or if it will cause prejudice to the opposite party which cannot be remedied. As the Constitutional Court stated in *Affordable Medicines Trust*, the discretion to grant an amendment, which must be exercised judicially in the light of all the facts and circumstances before the court will be limited if, “... the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.”

[17] In addition to prejudice, an amendment will not be allowed:

- i. in respect of an issue that has already been decided.

¹ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279A–E.

² [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at [9]. See also *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.

³ *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), 1998 (4) SA 1196 (SCA).

- ii. if it will not contribute to the determination of the real issues between the parties, and where -
- iii. the amended pleading *will* (not may) be excipiable⁴ and cannot be cured by further particulars.

[18] Distilled to its essence, the amendment sought is in three categories, comprising of: (a) pre-historical context (b) the oral misrepresentation and (c) the rectification claim. The balance of the amendments are textual corrections and averments consequential to the acceptance of the three categories referred to above. I deal with each category for ease of understanding their import and the objections raised.

Pre-historical Context introduced in paragraphs 28A.1 to 28A.6

[19] These amendments introduce background events and discussions about the establishment of the smart phone enterprise at Dube Trade Port in KwaZulu Natal between the fourth defendant, the President of the Republic of South Africa and staff members of his office in New York in September 2018. The staff members are identified under a blanket rubric of “the Presidency.”

[20] The second component involves introductory meetings between the fourth defendant and Ms Moseketsi from the IDC’s. It is alleged the fourth defendant was advised that “Mara Group would deal with and co-fund the enterprise with (at least) the plaintiff, a state owned enterprise.”

[21] The discussions introduced precede the conclusion of the Guarantee on which the action is based. As already alluded to, the Guarantee was entered into approximately six months after the conclusion of the loan and related documents. When questioned about this, Counsel for the defendants was unable to point to

⁴ See *Y.B v S.B and Others* [2015] ZAWCHC 109; 2016 (1) SA 47 (WCC) at [11].

facts eliciting whether Ms Moseketsi from the IDC drafted and or was a signatory to the Guarantee. The third parties are not joined as parties in these proceedings.

[22] The parol evidence rule applies to the pre-contractual discussions. As will be seen later, it has different permutations for the amendments proposed. During the hearing, Counsel for the defendants agreed that on its proper interpretation, the present Guarantee is an “on demand guarantee” payable within 24 hours. The concession brings the Guarantee into ambit of the decision in *State Bank of India and Another v Denel Soc Limited and Others*.⁵ The court held that, “Guarantees are ‘not unlike irrevocable letters of credit’ which establish a contractual obligation on the part of the guarantor to pay the beneficiary on the occurrence of a specified event.”⁶

[23] As the court in *Best Drive Holdings (Pty) Limited and another v Lewis*⁷ observed, with reference to the decision in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194(Pty) Ltd and Others*,⁸ the pre-contractual discussions may be relied on to elucidate the text of the Guarantee if there was a dispute about its nature or meaning.⁹ Since there is no such dispute, the pre-historic averments would not constitute admissible evidence and accordingly do not raise a triable issue. They are not about the interpretation of the terms or about and nature of the Guarantee.¹⁰ They do not contribute to the determination of the real issues between the parties.

Oral misrepresentation introduced in paragraphs 28A.7 and 28A.8

⁵ [2014] ZASCA 212; [2015] 2 All SA 152 (SCA).

⁶ Id at [7].

⁷ 2024 JDR 3941 (GJ) The court aptly notes that *Capital Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Limited and Others*, 2022 (1) SA 100 (SCA), at [38] provides a reconciliation between the continued recognition of the parol evidence rule and the statements of the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*.

⁸ [2021] ZASCA 99; 2022(1) SA 100 (SCA).

⁹ Id at [51].

¹⁰ Principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) which require the court to have regard to the context.

[24] The text of the oral misrepresentation bears restating, namely that “the Presidency and the IDC” in discussions with the fourth defendant represented that:

“... the plaintiff and/or the South African government would provide whatever support was required to ensure that the enterprise succeeded (including maintaining the employment of its employees and revitalizing the Dube Trade Port in KwaZulu-Natal, where the enterprise was to be built) and that, accordingly, the defendants would not be called upon to pay for any losses suffered by the enterprise should the enterprise fail by reason of the plaintiff's failure to provide whatever support was required to ensure that the enterprise succeeded ("the representation").

[25] The defendants allege that the oral misrepresentation induced them to invest in the enterprise and conclude the Guarantee. The defendants persisted with their stance that the oral misrepresentation “negated consensus rendering the Guarantee void *ab initio*.”

[26] The first point of departure by the IDC was that as a matter of law, it is a separate statutory entity with separate obligations and contractual dealings, from the people who allegedly made the representation. The defendants incorrectly attributed the IDC “and the presidency and/or the South African government, as a single entity.”

[27] I have no difficulty that it may well be that in certain circumstances our law accepts that a representation made by a third party can induce another to enter into a binding contract. However, under those circumstances, the capacity of the party who makes the representation and their authority to bind another into the contractual relationship (for example whether as principal or agent or contractor or employee) must be disclosed and pleaded.¹¹ None is pleaded in the amendment.

[28] Turning to the substance and text of the oral representation – it is partly framed as 'whatever financial and other support was required for the principal

¹¹See *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at [42].

debtor to succeed'. It is not possible to ascertain the allegations of fact required to distil its meaning or parameters or what the South African government represented it would do to support the enterprise of the Mara Group and how this induced the defendants to conclude the Guarantee on these vague terms. Such a term is lacking in particularity and vague.

[29] Another feature is that it alters the specified event upon which payment may be called from the Guarantors by inserting the words, “would not be called upon to pay for any losses suffered by the enterprise should the enterprise fail by reason of the plaintiff's failure to provide whatever support was required to ensure that the enterprise succeeded (“the representation”)”. The effect is that trigger for the call on the Guarantee is not the default by the borrower, (which was conceded is consistent with “on demand guarantee”) but is now subject to a condition and/ or potential disputes about the reasons for the failure of the borrower. Without pleading what was in the contemplation of the parties by what is meant by “reasons for the failure” of the enterprise with particularity, such a term is untenable in law and inconsistent with the construction of the Guarantee and lacks particularity required to sustain it.

[30] Assuming for the moment that the terms pleaded were feasible, which as can be seen above are not, the defendants do not allege whether the misrepresentation was made innocently, negligently or fraudulently. It does not follow as a matter of course that misrepresentations will *vitiare* a contract *ab initio*. This distinction is material as each form of representation has different consequences and remedies which may not be contractual in our law.¹² What is however undisputed is that a fraudulent misrepresentation unravels a contract.¹³ The absence of the pleaded facts distinguishing the nature of the

¹² See *Minister of Finance and Others v Gore* NO 2007 (1) SA 111 (SCA); [2006] ZASCA 98; [2007] 1 All SA 309 (SCA).

¹³ See also *SPF and Another v LBCCT/A LB and Another* [2016] ZAGPPHC 378 at [14].

misrepresentation relied on is material. Coupled with this, the defendants do not plead how they were misled to conclude the Guaranteed months after the loan documents, and whether a reasonable person would have been misled by the representation.¹⁴

[31] Absent the above facts and distinction, the amendment does not clarify the pleaded case and lacks a material averment required. It cannot stand as currently drafted. It must be sufficiently particular to enable the IDC to reply thereto.¹⁵

[32] Lastly, the debate about whether to permit the amendments is impacted by Clauses 14 and 22 of the Guarantee on the plea sought to be introduced. Clause 14 states that:

“No representations, promises or warranties have been made or given to the Guarantor by the IDC or any other person in connection with this Agreement.”

[33] Clause 22.2 records that:

“No Party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.”

[34] The question whether the IDC is precluded from relying on the above clauses of the Guarantee, to resist the amendment part of which ensued during the exception resurfaced. The exception court did not depart from the principle that an oral agreement varying (at least materially) the term of a contract is not permissible especially where those terms are placed in issue.¹⁶ I agree with the finding by the exception court.

[35] The above clauses apply and remain extant, and that difficulty has not been cured by the proposed amendment. The defendants have not appealed the

¹⁴ See *Curtis v Dowdle* [2023] ZAGPJHC 3 at [42] - [45].

¹⁵ See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) [2011] ZACC 30; BCLR 219 (CC), 2012 (1) SA 256 (CC) at [52].

¹⁶ *Neethling v Klopper en Andere* 1967 (4) SA 459 (A) points out that there was no objection to relying on proof of an oral agreement relating to the cancellation of the contract where unlike the present case its terms are not placed in issue.

exception decision which still stands. The amendment is bad in law and is excipiable.

Rectification Claim in paragraphs 28B, 28C, 28D and paragraphs 30.8A, 30.11, 30.14 and 31.1

[36] As illustrated by the court in *Kathmer Investments (Pty) Ltd v Woolworths*,¹⁷ rectification of a written contract generally presupposes the existence of a term of the real agreement, *antecedent* to the written contract, which has not been properly recorded. It corrects an inaccuracy. All that must be done is, upon proper proof, to correct the mistake, reproduce in writing the real agreement between the parties.

[37] The rectification claim involves amongst other terms, the inclusion of the representation in paragraphs 28B and 28C that the defendants:

“would not be called upon to pay for any losses suffered by the enterprise should the enterprise fail by reason of the plaintiff's failure to provide whatever support was required to ensure that the enterprise succeeded.”

[38] The defendants contend that without the rectification, there was no consensus between the parties, and the rectification of the Guarantee to the effect that the plaintiff may not look to the defendants to recover its losses in the circumstances, is necessary to give effect to their common intention.

[39] As indicated earlier in the judgment, whether the defendants are precluded from leading evidence of a prior oral agreement or common continuing intention in support of a claim for rectification arises, albeit from a different legal position. It will be recalled that I found earlier that in so far as the interpretation of the Guarantee is concerned, evidence of the pre-historic context would be hit by the parol evidence rule and thus be inadmissible.

¹⁷ 1970 (2) SA 498 (A) p 503B.

[40] In this instance, the introduction of that context would have been to establish the common continuing intention to support the rectification claim. As will be seen, when the amendment and the plea are considered as a whole, it is clear there was no common continuing intention.¹⁸ A common mistake can only occur where both the IDC and the defendants were of one mind and share the same mistake - they were in this regard, *ad idem*.¹⁹

[41] The defendants do not allege that if *both parties* had been aware that the alleged representation was not included as a written term of the Guarantee, both parties would not have concluded the Guarantee. Conceived differently, a question to be asked about the *common error* and *bona fide* mistake is whether the IDC would have agreed to either replace or amend the existing Guarantee to meet defendants' concerns. The answer must clearly be no. The defendants acknowledged when they signed the Guarantee that they had read it, understood and accepted its contents. It should have been apparent during the exception that there was no consensus, and there would be no such consensus about the newly crafted terms introduced by the defendants. [Emphasis added]

[42] Our Courts have also confirmed that as "*an instrument*" that compel payment irrespective of the status of the underlying debt, Guarantees are construed and require strict compliance with their terms.²⁰ The amendments and the prayer for rectification qualifies the Guarantee in a manner which undermines the defendants' liability obligation and conflicts with its written terms. It limits its enforcement and subjects the call for payment on the Guarantee to amorphous events, a recipe for further disputes about those events. In effect, the amendments are designed not merely to elucidate, but to negate the essential content of the

¹⁸ See *Rand Reitsefontein Estates v Cohn* 1937 AD 317 at 327.

¹⁹ See *Tshivhase Royal Council and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 863A – 863C; referring to Christie *Law of Contract in South Africa* 2nd ed at 382 and 397-8.

²⁰ *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd* [2011] ZASCA 149; 2012 (2) SA 537 (SCA).

guarantee. All these point to prejudice and strike at the heart of the legal nature of the Guarantee. It does not assist to clarify the issues between the parties.

[43] What stands out is that the rectification is based on a *common error* and *bona fide* mistake. That averment is anomalous and inherently conflicts with the allegations of an oral misrepresentation which vitiates the Guarantee and consensus *ab initio*. A conflicting pleading of the nature proposed is impermissible and would prejudice the IDC from discerning the case it must meet. The IDC's complaint that it is not clear from the intended amendment whether the defendants' defence is based on a common mistake or misrepresentation, or rectification is not unwarranted.

[44] The terms sought to be introduced are disputed and could not reasonably have been expected in the Guarantee. It would be prejudicial to the IDC to permit same by an amendment.

Conclusion

[45] As the court held in *Ciba -Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander*²¹ (*Ciba- Geigy*), the defendants were required to explain the reason for the application and show worthiness of consideration. They were required to show *prima facie* that there is something deserving of consideration, a triable issue, a dispute which, if it is proved based on the evidence foreshadowed by the defendants, will be viable or relevant.

[46] For the reasons stated under each of the categories of the amendments, the threshold envisaged in *Ciba- Geigy* is not met. On the contrary, the application for amendment points to the absence of one made *bona fides* but is designed to diminish the effect of the Guarantee to prevent the call for payment and/or to

²¹ 2002 (2) SA 447 (SCA) at [34].

overcome the criticism by the exception court. The IDC would be prejudiced if the amendments were allowed.

[47] In sum: I conclude as dealt with seriatim above that the amendments respectively:

- i. Do not raise a triable issue,
- ii. Lack the necessary averments.
- iii. Exhibit an inherent legal conflict, bad in law and are excipiable.
- iv. They are prejudicial to the IDC.

[48] The application for amendments proposed in paragraphs (a) 28 A1 to 28A.6; (b) 28A.7 to 28A.8, (c) 28B to 28C, (d) 30.8A, 30.11, 30.14 and 31.1 (the main amendment) is refused. Since the remainder of the amendments are consequential on the granting of the main amendments, the rest of the amendments must follow a similar fate.

[49] There is no reason why costs should not follow the result. As is apparent from the judgment, costs on a higher scale are justified because of the defendants' approach.

[50] Accordingly, the following order is made:

- a. The defendants' application to amend their plea, is dismissed with costs;
- b. The costs above shall be on Scale C limited to the costs of Senior Counsel and one Junior Counsel.



NTY SIWENDU
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment is handed down electronically by circulation to the Plaintiff's Legal Representative and the Defendants by email, publication on Case Lines. The date for the handing down is deemed 3 April 2025

Date of Appearance: 03 February 2025

Date Judgment delivered: 03 April 2025

Appearances:

For the Plaintiff:	Advocate I Pillay SC
With:	Advocate Broster (Junior)
And	Advocate S Mchunu (Junior)
Instructed by:	Pather and Pather Attorneys
For the Defendants:	Advocate R Patrick SC
With:	Advocate C Quinn (Junior)
Instructed by:	De Klerk and Van Gend Inc