THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

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

08 May 2025
DATE

[redacted]
SIGNATURE

CASE NO: 919 / 2020

In the matter between:

MAMOKUTHU DEVELOPMENT CC	**APPLICANT**
And	
CAS DRY ATTORNEYS INC	**FIRST RESPONDENT**
BAREND MARITZ DRY	**SECOND RESPONDENT**
NAD PROPERTY INCOME FUND (PTY) LTD	**THIRD RESPONDENT**
BUSHBUCKRIDGE LOCAL MUNICIPALITY	**FOURTH RESPONDENT**

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 08 May 2025 at 09H00.

[1] Background

This is the application for leave to amend the particulars of claim by the plaintiff (the Applicant in *casu*). The application is premised on Rule 28, following the objection to the Applicant's notice to amend by the First and Second Respondents (the Respondents), first and second defendants in the main action. At this stage, the pleadings are closed, and matter was set down for hearing on a special plea of prescription, but it was postponed pending the finalisation of this application. According to the Applicant, the amendment was necessitated by the discovery and failure to discover certain documents by the Respondents. The application to amend is opposed by the Respondents on the basis that the amendment would cause them prejudice.

[2] In the main action, the claim against the Respondents is for the payment of the proceeds of sale following the deed of sale agreement signed on 31 May 2013, in terms of which an immovable property was sold by the Fourth Respondent to the Third Respondent for about R12.2 million. The Applicant was also contracted in this agreement with mandate to develop the property into a

shopping centre. According to the particulars of claim as they stand currently,[1] the claim is for the payment of the balance of the purchase price to the Applicant following the full payment and the registration of the property in the names of the Third Respondent. The First Respondent as the conveyancer that attended to the registration of the property, together with the Second Respondent who is a Director for the First Respondent, received the full payment from the Third Respondent and the property registration is complete.

[3] According to the deed of sale, the Third Respondent had to deposit R1 million, as part of the purchase price, for the First Respondent to invest in an interest-bearing account for the Applicant's benefit. This amount would be released by the First Respondent to the Applicant, on the date the Third Respondent would have acquired a valid final occupation certificate from the Municipality, entitling it to unconditionally commence its business as a shopping centre.

[4] This application focuses on amending paragraph 8 of the particulars of claim which, in its current format reads as follows:

> 8.1 "In the premises, following the Plaintiff's performance, the Third Defendant's occupation of the immovable property and registration of the immovable property in favour of the Third Defendant, the Plaintiff is entitled to receive the balance of the purchase price less commissions due to the First Defendant as provided for in the sale and development agreement.
>
> 8.2 The Third Defendant paid the purchase price to the First Defendant prior to the parties' final performance in terms of the sale and development agreement, alternatively prior to the Third Defendant occupying the immovable property, in the further alternative prior to the immovable property being registered in favour of the Third Defendant.
>
> 8.3 The Plaintiff's entitlement to receive the balance of the purchase price in the premise, flows forth from the Plaintiff's performance in terms of the sale and development agreement.

[1] See p. 78 of the paginated bundle. The particulars of claim were amended once before.

8.4 The obligation to have received the purchase price from the Third Defendant and to have effected payment of the balance of the purchase price to the Plaintiff befell the First Defendant, as a result of the appointment of mandate as transferring attorneys in terms of the sale and development agreement.

8.5 The First Defendant to date hereof effected payment of an amount of R3 025 576.59 (three million, twenty-five thousand, five hundred and seventy six rand and fifty-nine cents) to the Plaintiff from the purchase price it held as a result of the aforesaid mandate.

8.6 The balance payable from the purchase price so payable by the First Defendant to the Plaintiff amounts to R6 521 135.03 (six million five hundred and twenty one thousand, one hundred and thirty five rand and three cents) which monies the First Defendant by virtue of its mandate ought to hold in an interest bearing account, alternatively the sum of R1 million which ought to have been held in an interest-bearing account.

8.7 The aforesaid amount became due and payable to the Plaintiff upon the date of registration of the immovable property in favour of the Third Defendant, and in the premises interest accrued on such claim as from date of registration of the immovable property, being July 2013.

8.8 Furthermore, the totality of the purchase price, alternatively an amount of R1 000 000.00 (one million rand) was to be invested in terms of an interest-bearing account by the First Defendant and the Plaintiff is entitled to the proceeds thereof, the specific particulars of which are not at this stage at the Plaintiff's disposal.

8.9 The Plaintiff concedes that the First Defendant is entitled to deduct from the purchase price commission of 3% plus VAT on the amount of R8 000 000.00 as well as the First Defendant's costs in terms of clause 2.10, to the maximum amount of R200 000.00 (two hundred thousand rand).

8.10 In the premises the Plaintiff is entitled to receive payment from the First Defendant of the amount of R6 521 135.03 (six million five hundred and twenty-one thousand, one hundred and thirty-five rand and six (sic) cents), together with interest thereon as well as interest on the amount of R1 000 000.00 (one million) as gained in an interest-bearing account.

8.11 The Plaintiff is currently not in a position to state the particulars of the applicable interest rate to the aforementioned interest-bearing accounts and shall, upon

discovery by the parties, consider amending the particulars of claim in relation thereto and insofar as such may be required."

[5] In terms of the notice to amend, which is now subject of this application, the Applicant seeks an order authorising that paragraph 8 of the particulars of claim shall now read as follows,

8.1 "In the premises, following the Plaintiff's performance, occupation and registration of the immovable property in favour of the Third Defendant, the Plaintiff is entitled to receive the balance of the purchase price less the deductions which are permitted in terms of the sale and development agreement.

8.2 The Plaintiffs entitlement to receive the balance of the purchase price, in the premise, flows forth from the plaintiff's performance in terms of the sale and development agreement.

8.3 The obligation to have received the purchase price from the Third Defendant and to have effected payment of the balance of the purchase price to the Plaintiff befell the Third Defendant as a result of the appointment of mandate as transferring attorneys in terms of the sale and development agreement.

8.4 The First Defendant to date hereof effected payment of an amount of R3 025 576.59 (three million, twenty-five thousand, five hundred and seventy six rand and fifty-nine cents) to the Plaintiff from the purchase price it held as a result of the aforesaid mandate.

8.5 The balance payable from the purchase price so payable by the First Defendant to the Plaintiff amounts to R6 521 135.03 (six million five hundred and twenty one thousand, one hundred and thirty five rand and three cents) which monies the First Defendant by virtue of its mandate ought to hold in an interest bearing account, alternatively the sum of R1 million which ought to have been held in an interest-bearing account.

8.6 The aforesaid amount became due and payable to the Plaintiff upon the date of registration of the immovable property in favour of the Third Defendant, and in the premises interest accrued on such claim as from date of registration of the immovable property, being July 2013.

8.7 Furthermore, the totality of the purchase price, alternatively an amount of R1 000 000.00 (one million rand) was to be invested in terms of an interest-bearing

account by the First Defendant and the Plaintiff is entitled to the proceeds thereof, the specific particulars of which are not at this stage at the Plaintiff's disposal.

8.8 In the premises the Plaintiff is entitled to receive payment from the First Defendant of the amount of R6 521 135.03 (six million five hundred and twenty-one thousand, one hundred and thirty-five rand and three cents), together with interest thereon as well as interest on the amount of R1 000 000.00 (one million) as gained in an interest-bearing account.

8.9 The Plaintiff is currently not in a position to state the particulars of the applicable interest rate to the aforementioned interest-bearing accounts."

[6] Grounds of objection by the Respondents.

In response to the Applicant's notice to amend the particulars of claim, the Respondents raised the following as the grounds of objection to the envisaged amendment:

5.1 "The Plaintiff intends to introduce with the proposed amendment a new cause of action into the claim of the plaintiff in respect of payment of the purchase price and the R1 million when no such cause of action exists, against the First and Second Defendants.

5.2 Any such claim and the new cause of action has become prescribed and cannot therefore be introduced by amendments.

5.3 The Plaintiff tries to exclude paragraphs 8.2 and 8.9 of the existing particulars of claim, which in effect constitutes a withdrawal of admissions without bringing an application for the withdrawal of such admission.

5.4 In this regard the substitution of the reference to "commissions" due to the First Defendant in paragraph 8.1 with the wording "less the deductions which are permitted in terms of the sale and development agreement," constitute an attempt of a withdrawal of an admission.

5.5 The exclusion of the current paragraph 8.2 of the current particulars play constitutes an attempt to avoid an admission of prescription of the claim of Plaintiff, as a result of the allegations made therein, and should not be allowed as it is tantamount to a withdrawal of an admission.

5.6 The attempt to exclude the current paragraph 8.3 of the current particulars of play it's a further attempt to avoid prescription and admission of prescription of the plaintiffs claim which is also tantamount to a withdrawal of an admission."

[7] Rule 28.

Rule 28 of the Uniform Rules of the High Court provides,

"**Amendments to pleadings and documents**

(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any

consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

[8] In what appears to be a quotation from a judgment by Watermeyers J, in *Moolman v Estate Moolman*[2] counsel for the Respondents made the following submission: '[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless 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.'[3]

[9] The practical rule is that an amendment will not be allowed if the application to amend is made *male fide* or if the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.[4] Erasmus' Commentary on *Uniform Rules of the High Court*[5] defines prejudice as 'embracing prejudice to the rights of a party regarding the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party's rights.' Where a party would be no worse off if the amendment was granted with a suitable order as to costs than if his adversary's application

[2] 1927 CPD 27 at 29.
[3] See also *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2024 (1) SA 331 (CC) at paragraphs [64]–[67] and [87] where this approach was referred to with approval.
[4] See *Media 24 (Pty) Ltd v Nhleko and Another* (109/22) [2023] ZASCA 77 (29 May 2023) at para 16.
[5] RS 25, 2024, D1 Rule at p. 28-7.

or summons were dismissed unamended and proceedings were commenced afresh, there is no prejudice in granting the amendment. The mere loss of the opportunity of gaining time is not in law prejudice or injustice. As Riley AJ remarked in *YB v SB and Others*, the primary consideration in applications of this nature seems to be whether the amendment will have caused the other party prejudice which cannot be compensated for by an order for costs or by some or other suitable order such as a postponement.[6]

[10] Whereas the courts have a discretion to allow amendments at any stage before the handing down of judgment, it goes without saying that the closer the proceedings are, to the judgment stage, the likelihood of prejudice being suffered by the opponent becomes real. This is because of the inconvenience associated with the reopening of the case that could be closed already at that stage, in order to rebut the lacuna caused by the amendment, and the expenses that comes with it. If, however, the proceedings are far from the judgment stage, like where the trial has not even commenced, the prejudice would be less likely, and the courts would be inclined to allow the amendments. Equally, the fact that the granting of the amendment would necessitate the reopening of the case for further evidence to be led is no ground for refusing the amendment where the reason for the failure to amend or lead that evidence during the pleadings' stage, was not a deliberate failure on the part of the applicant.[7]

[11] The Respondents aver that in the application to amend, the Applicant attempts to withdraw admissions without applying to the court for leave to withdraw. The Respondents however fail to demonstrate any admission that would be withdrawn if the amendment is allowed. Further to this, they are unable to refer the court to any authority to the effect that if the particulars of

[6] See *YB v SB and Others* (8064/2014) [2015] ZAWCHC 109; 2016 (1) SA 47 (WCC) (13 August 2015) at para 11.
[7] *Myers v Abramson* 1951 (3) SA 438 (C) at 450A–B.

claim can constitute or contain an admission, such cannot be withdrawn except with the leave of court.

[12] The Respondents do not elaborate as to what they mean when alleging that excluding paragraphs 8.2 and 8.9 of the existing particulars of claim, the Plaintiff tries to withdraw admissions without bringing an application for withdrawal. Paragraph 8.2 referred to provides, "the Third Defendant paid the purchase price to the First Defendant prior to the parties final performance in terms of the sale and development agreement, alternatively prior to the Third Defendant occupying the immovable property, in the further alternative prior to the immovable property being registered in favour of the Third Defendant." I do not see any admission made by the Applicant in this paragraph, especially pertaining to the Respondents. This paragraph lays bare a claim to the effect that the First Respondent was paid the purchase price by the Third Respondent.

[13] When the matter was argued, counsel for the Respondents submitted that the paragraph sought to be omitted comprised of an admission in that a payment was made by the Third Respondent prior to the parties' final performance in terms of the sale and development agreement, alternatively prior to the Third Defendant occupying the immovable property, in the further alternative prior to the immovable property being registered in favour of the Third Defendant. The gist of the admission so alleged is when the payment was made in that this bolsters the Respondents' argument that the claim has prescribed.

[14] However, in pleading to this paragraph, the Respondents made no admission of these averments. In their plea, the Respondents said, "the first and second defendants deny each and every allegation in this paragraph and plead that the third defendant paid the amount of R2 425 576.59 into the trust account of Caz Dray Attorneys, the firm, whereafter the amount was paid to the plaintiff

on 7 August 2013."[8] What is clear from the plea is that the Respondents deny each and "every allegation in the paragraph" that they now claim contains an admission.

[15] An admission is an unequivocal agreement by one party with a statement of fact by the other.[9] The effect of an admission is to render it unnecessary for the plaintiff to prove the admitted fact.[10] As Shepostone AJ noted in Thompson Kusela judgment, this does not imply that a party who has made an inaccurate or mistaken admission is left without recourse. Such a party may deliver a notice of its intention to withdrawal the admission. There is clearly no "unequivocal agreement between by one party with a statement of fact by the other" that can be read into paragraph 8,2 of the particulars of claim as they stand. What appears from the plea is a clear dispute between them.

[16] Under paragraph 8.9, the Applicant had averred that "the Plaintiff concedes that the First Defendant is entitled to deduct from the purchase price commission of 3% plus VAT on the amount of R8 000 000.00 as well as the First Defendant's costs in terms of clause 2.10, to the maximum amount of R200 000.00 (two hundred thousand rand)." In the notice to amend, this paragraph would now be replaced with, "in the premises, following the Plaintiff's performance, occupation and registration of the immovable property in favour of the Third Defendant, the Plaintiff is entitled to receive the balance of the purchase price <u>less the deductions which are permitted in terms of the sale and development agreement</u>." [My emphasis].

[17] My understanding of the proposed new paragraph is that it does not withdraw anything, but it expands from what it had provided, which was limited

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[8] See p. 119, paragraph 55 of the paginated bundle.
[9] See *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452F).
[10] *Thompson Kusela CC t/a Thompson Security Group v Dewald Buys t/a Masima Block Watch* (2017/39176) [2023] ZAGPJHC 692 (13 June 2023) at paragraph 11.

to deductions of commissions and VAT. In its proposed format, VAT and commissions could just be some of the deductions that are provided for in the contract, but there could be more.

[18] To the extent that the proposed paragraph could be a withdrawal of a concession made in the particulars of claim, the Applicant remains covered and protected by Rule 28 in that one can amend an admission erroneously made in the particulars of claim. This is the whole purpose of introducing this rule. The Applicant's case needs not be mistaken for a case where in a claim, a party admits the merits of the claimant's case. Thus, a court will not allow an amendment introducing a defence on the merits where the parties have agreed that the merits and the *quantum* are to be separately following a concession on the merits by the defendant, that has been accepted by the plaintiff. By compromising the merits, the defendant precludes himself from being able to revisit the merits just the same as judgment had been given thereon.[11]

[19] If a party makes a mistake in the pleadings by, for example, demanding too little when more is owing, or by admitting that the defendant has paid portion when in fact he has not, he gives his opponent an advantage which justice and fair dealing would not condone. If the opponent is then deprived of this unjust advantage by an amendment, the parties are put back for the purposes of justice in the same position as they were when the pleading sought to amend was filed. The opposing party suffers no injustice and is not prejudiced, for he is in no worse position than he would have been if the pleading in its amended form had been filed in the first instance.[12]

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[11] *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978(2) SA 219 (T) at 223B.
[12] See *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8].

[20] In *De Beer v Unica Iron and Steel (Pty) Ltd*[13] Davis J remarked that if a party makes a tactical blunder by, for example, admitting an allegation which can only be proved by a particular witness, who is then released by his opponent and leaves the country, his opponent may be prejudiced by an amendment withdrawing the admission. If the witness were not capable of recall or evidence could not be obtained from him on commission, then even though the admission might have been made *bona fide*, withdrawal of the admission would probably not be allowed.

[21] I take note of the fact that the trial in this matter has yet to commence. There is no allegation that the Respondents may have released some witnesses as a result of the concessions allegedly made. In actual fact, there is no real prejudice that the Respondents may suffer if the amendments referred to in this paragraph were to be allowed. The Respondents are not in any worse situation than they were under the current particulars of claim. The fact that there could be chances for the Respondents to lose the case does not qualify on its own to be categorised as prejudice. Furthermore, there is no factual basis on which to reject the Applicant's averment to the effect that no dates can be put on these paragraphs, owing to the Respondents refusing to discover bank statements bearing the dates thereon.

[22] The argument by the Respondents that the claim has prescribed does not salvage their objection. The special plea on prescription is yet to be heard and decided. The prescription of the claim has very little to do with the omission or inclusion of the dates on which payments were made by the Third Respondent, into the First Respondent's account. It has everything to do with the date on which the debt became due and payable.

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[13] (88472/2018) [2021] ZAGPPHC 793 (26 November 2021) at para 4.

[23] If the court shall find in favour of the Respondents in the special plea, the claim shall be dismissed. The notice to amend does not introduce a new claim but clarifies what may not have been clear in the particulars of claim as they stand. In the current particulars of claim, the Applicant reserved the right to amend its particulars of claim given the fact that the documents that would disclose the interests acquired in the interest-bearing account, were yet to be discovered.

[24] In *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste*[14] it was held that where an objection is raised to a proposed amendment to a pleading on the ground that the pleading as amended would be excipiable, the court should not confine itself to an inquiry as to whether or not the question of excipiability is arguable. The court should instead make a finding and if it finds that the pleading as amended would be excipiable, the application for amendment should be refused.

[25] In *casu*, the Respondents do not elaborate as to how the proposed amendment can be said to be excipiable. One remains not knowing if they suggest that the proposed amendment could be vague and embarrassing or if it does not disclose the cause of action. Presuming that such is their argument, this court is of the view that the proposed amendment is not vague and it does disclose a cause of action. If the amendment was the Applicant's way to remove the cause of complaint, the notice of amendment should therefore be commended for that. This I say without necessarily holding that the particulars of claim was by anyway vague and embarrassing or that they disclosed no cause of action. The court finds that paragraph 8 of the amended particulars of claim is therefore not excipiable.

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[14] 1980 (1) SA 250 (C) at 258H–259A. See also See also *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363D–F; *Neale N.O. v Pipeflo (Pty) Ltd* (23970/21) [2022] ZAGPPHC 667 (19 September 2022) at paragraphs 46–53.

[26] Rule 28(9) provides that a party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party. There is no reason advanced for ordering otherwise. The costs associated with this provision are dependant on what the Respondents are caused to do as a result of the amendment. These are not the costs of opposing the application for amendment, which costs would normally follow the outcome, unless the court orders otherwise.

[27] While the court has a discretion to order that the costs of objecting to the amendment should be included as costs occasioned by the amendment, the circumstances of this case do not justify that order. I hold a view that the objection to the amendment was frivolous and not necessary as the Respondents clearly suffer no prejudice therefrom. In *Rabinowitz v Van Graan*[15] it was held that 'a *bona fide* amendment of a pleading with the object of ventilating the real issues between the parties must be allowed. The party choosing to contest the issue is expected to decide at its own risk whether or not to declare battle. There is no consideration why I should deviate from the general principle. For these reasons the costs should follow the result, ie the unsuccessful parties should be ordered to pay the costs.'

[28] <u>The Order:</u>

For the aforesaid reasons, I make the following order.

28.1 The Applicant is granted leave to amend the particulars of claim in terms of the notice of intention to amend dated 30 July 2024.

28.2 The First and Second Respondents are ordered to pay the costs of this application including costs of two counsel.

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[15] 2013 (5) SA 315 (GSJ) at paragraphs 45-46. See also *Moolman v Estate Moolman* 1927 CPD 27; *Kirsh Industries Ltd v Vosloo and Lindeque* 1982 (3) SA 479 (W) at 486A–C; *Cordier v Cordier* 1984 (4) SA 524 (C) at 536A

TV RATSHIBVUMO

DEPUTY JUDGE PRESIDENT

MPUMALANGA DIVISION OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT:	**ADV. G SHAKOANE SC &** **ADV MH MBATHA**
INSTRUCTED BY:	**MPHO MSHILOANE ATTORNEYS** **MBOMBELA**
FOR THE RESPONDENT:	**ADV. R DU PLESSIS SC &** **ADV M BOONZAAIER**
INSTRUCTED BY:	**CAZ DRY ATTORNEYS INC** **MBOMBELA**
DATE HEARD:	**06 MAY 2025**
JUDGMENT DELIVERED:	**08 MAY 2025**