



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no.: A143/2024

In the matter between:

EBESA Architects (Pty) Ltd

Appellant

and

The City of Cape Town

Respondent

JUDGMENT ELECTRONICALLY DELIVERED ON 09 APRIL 2025

A. INTRODUCTION

[1] This is an appeal, with leave of the Supreme Court of Appeal (SCA), against the judgment of my sister Mantame J of this Division, in which she dismissed the appellant's application for leave to amend its Plea and Conditional Special Plea, with costs.

[2] The brief history of the litigation is that the respondent ("*the City*") had instituted an action against the appellant (as first defendant) and five other defendants for damages based on two tender contracts that were to be executed *in tandem*. The first tender was granted to a joint venture made up of the first to fifth

defendant (*“the Ebesa JV”*), while the second tender was granted to the sixth defendant.

[3] After the appellant delivered a plea to the particulars of claim, the City delivered a replication, and thereafter amended its particulars of claim, without objection. Subsequently, the appellant delivered a notice of intention to amend, to which the City objected. As a result, the appellant brought a formal application for leave to amend, which was opposed by the City, and is the subject of the judgment under appeal.

[4] Although the decision regarding whether to grant or refuse an application to amend a pleading rests within the discretion of the court, the discretion must be exercised with due regard to certain basic principles.¹ The practical rule emerging from the case law is that amendments will always be allowed unless an amendment is *mala fide* or will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 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.²

[5] Although the granting of an amendment is an indulgence to the party asking for it, the modern tendency of the courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.³ The power of the court to allow even material amendments is therefore limited only by considerations of prejudice or injustice to the other side.⁴

B. THE AMENDMENTS

[6] The appellant seeks to make a range of amendments to its Conditional Special Plea and its Plea, numbered from 1.1 to 1.3, and 2.1 to 2.9 in the notice of motion, respectively. Before the hearing in the court *a quo*, the appellant withdrew its

¹ *Caxton Ltd. and Others v Reeve Forman (Pty) Ltd. and Another* (393/88) [1990] ZASCA 47; 1990 (3) SA 547 (AD); [1990] 2 All SA 300 (A) (17 May 1990) at 565G.

² *Moolman v Estate Moolman & another* 1927 CPD 27 at 29. *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 9.

³ *Media 24 (Pty) Ltd v Nhleko and Another* (109/22) [2023] ZASCA 77 (29 May 2023) para 16.

⁴ *Media 24 (Pty) Ltd v Nhleko and Another* para [16].

application in respect of paragraphs 2.4, 2.8 and 2.9 of its notice of motion, whilst the relief sought in paragraph 2.5 was not opposed and was granted by the court *a quo*. It is accordingly not necessary to deal with the amendments sought in those paragraphs.

Paragraphs 1.1 & 1.2 of notice of motion (paragraphs 2 & 3 Conditional Special Plea)

[7] The intended amendments to the Conditional Special Plea were set out in paragraphs 1.1 and 1.2 of the notice of motion as follows:

- ‘1. By deleting the phrase *“failing which such a dispute would first be referred to either mediation or adjudication, and then to arbitration”* in paragraph 2 thereof and by replacing it with *“failing which such a dispute would be referred to mediation”*.
2. By deleting the phrase *“nor was the dispute ever referred to or determined by mediation, adjudication or arbitration”* in paragraph 3 thereof and replacing it with *“nor was the dispute ever referred to mediation”*.”

[8] The appellant states that the amendments are sought to ensure that the provisions of the the Contract Data, which is the document that regulates the resolution of disputes between the parties, are correctly pleaded. According to the appellant, clause 12.1.2 thereof provides that the interim settlement of disputes is to be by way of mediation, and is silent regarding adjudication and arbitration, which are currently mentioned in the Conditional Special Plea.

[9] The City’s objection is that the amendments are contrary to the clear wording of the Contract Data. Specifically, that they are incomplete and inconsistent with the wording clause in 12.2.4 of the Contract Data, which is the applicable provision, and which, according to the City, contains the words *‘or final settlement by litigation’* after the word *‘mediation’*. The City argues that clause 12.2.4 is the applicable provision because it is common cause that the date of practical completion of the contract was 17 July 2019, which means the date for resolution by mediation had passed. As a

result, the effect of the amendment would be prejudicial to it because if the matter proceeded to mediation, its claim may have become prescribed.

[10] The court *a quo* agreed with the City and held that the reference to mediation was a dilatory tactic by the appellants, aimed at avoiding paying damages for as long as possible. The court also held that the intended amendment was an attempt to withdraw an admission already made by the appellants, for which there was no explanation.

[11] The court *a quo* remarked that none of the appellant's amendments were consequential upon the City's amendment to its particulars of claim, which it said was a clear indication that the appellant was seeking to change the formulation of its defences. The court also held that the City's claim was not determinable at the time that the contractual works were still ongoing for submission to mediation, adjudication or arbitration, and that its loss could only be determined upon practical completion of the contract.

[12] It is necessary to have regard to the pleadings in detail. The original paragraphs 2 and 3 of the Conditional Special Plea, which were sought to be amended, read as follows:

“Take notice further that in the alternative and in the event that the Court should find that the agreement between the plaintiff and the [JV] as pleaded by the plaintiff in paragraphs 9 to 14 of its particulars of claim has not terminated, the [appellant] raises the following Conditional Special Plea:

...

2 Clause 12 of the [Standard Professional Services Contract July 2009 (Edition 3 of CIDB document 10/14 “the Conditions”)] determines that the plaintiff and the Joint Venture (“JV”)] would negotiate in good faith with a view to settling any dispute, failing which such a dispute would first be referred to either mediation or adjudication and then to arbitration.

3 The plaintiff made no attempt to settle any dispute by way of negotiating in good faith with the JV, nor was the dispute ever referred to or determined by mediation, adjudication, or arbitration”

[13] In response to the above, the City replicated as follows:

“Ad paragraph 2 thereof

The plaintiff was not in a position to assess the loss at that time due to the actual work delays which were not anticipated, nor could they be quantified.

Ad paragraph 3

Plaintiff admits these allegations.”

[14] Thus, far from disputing the applicability of mediation as a dispute resolution mechanism, in addition to adjudication and arbitration, the City admitted it in its replication. Its explanation for not being able to comply with those dispute resolution mechanisms was that it was not in a position to assess the loss at that time due to work delays which were not anticipated, nor could they be quantified.

[15] Given that this was in response to the appellant’s conditional plea which was pleaded *“in the alternative and in the event that the Court should find that the agreement between the plaintiff and the JV as pleaded by the plaintiff in paragraphs 9 to 14 of its particulars of claim has not terminated”*, the time period referred to in the replication could only be a reference to the duration of the agreement between the parties. In other words, the effect of the replication was to admit the applicability of mediation during the existence of the agreement, and to explain that at the time, the City was not in a position to assess or quantify its losses.

[16] In the Contract Data, the word ‘mediation’ is only used in clause 12.1.2, not in clause 12.2.4. The relevant provisions of the Contract Data state as follows:

“Clause 12.1.2:

Interim settlement of disputes is to be by mediation.

...

Clause 12.2.4:

Final settlement is by litigation.”

[17] Contrary to what was claimed in the City’s objection, clause 12.2.4 does not provide for ‘*final settlement by litigation*’ after the word ‘*mediation*’. There is no mention of the word ‘mediation’ at clause 12.2.4. It is in clause 12.1.2 that ‘mediation’ appears as the only dispute resolution mechanism available for interim settlement of disputes, which the City had originally admitted.

[18] Moreover, there is no mention of ‘adjudication’ or ‘arbitration’ in clause 12.1.2, and in that regard the appellant is correct when it states that the amendment is intended to reflect the wording of that provision. If the conditional special plea is left unamended, it places upon the parties an additional obligation to refer a dispute regarding an extant contract to adjudication and/or arbitration, which is not provided for in the Contract Data.

[19] An issue that took prominence at the appeal hearing is the so-called withdrawal of a clear and unequivocal admission of liability on the part of the appellant regarding the fact that the date of practical completion of the contract was 17 July 2019, and that as a result, the date for dispute resolution by mediation had passed. In support of this argument, the City refers to paragraphs 17 to 19 of the particulars of claim, which state as follows regarding the timeframe that is said to be common cause:

“SECOND TENDER - [SIXTH DEFENDANT]

15. On 4 March 2016 the City published a tender which closed on 5 April 2016 in respect of the Bloemhof: Network Control Centre (“the NCC”) and High Voltage Depot (“the HVD”) under Tender Number 267Q/215/16 (“the second tender”).

16. The services in terms of the second tender had to be executed *in tandem* with the professional services awarded in terms of the first tender.
17. The City awarded the second tender to [the 6th defendant] on 6th March 2017 with a contract value of 97.3 million (excluding vat) which was accepted by [the sixth defendant] on the same date.
18. The duration of the contract was for a period of 11 months commencing on 1 June 2017 and ending on 12 June 2018.
19. The completion date was further revised to 17 July 2019 and practical completion was achieved on 17 July 2019.”

[20] The appellant pleaded as follows to these paragraphs:

“Ad paragraphs 15 to 21 thereof

19. Other than to admit that on or about 6 March 2017, the plaintiff and the sixth defendant concluded a construction contract (“the Construction Contract”) in terms whereof the sixth defendant would attend to the design and construction of the Bloemhof Network Control Centre and High Voltage Depot of the plaintiff (“the Works”) the first defendant does not have any personal knowledge of the allegations in these paragraphs.”

[21] Far from admitting the date of completion of the contract, the appellant pleaded ‘no knowledge’, which is permissible in terms of Uniform Rule 22(2).⁵ A plea

⁵ Uniform Rule 22(2) provides: “The defendant shall in [his or her] plea either admit or deny or confess and avoid all material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which [(s)he] relies”. In *Wilson v South Africa Railways and Harbors* 1981 (3) SA 1016 (C) it was held that, in terms of Uniform Rule 22(2) a defendant has a right to plead non-admission where it has no knowledge of certain facts.

of ‘no knowledge’ does not constitute a “*clear and unequivocal admission of liability*” as contended by the City, and is in fact closer to a denial.⁶

[22] Besides, it is abundantly clear from the contents of the plea that the appellant denies that the services contract was extended, and instead pleads that it was terminated on 30 June 2016.⁷ This is evident from, amongst others, paragraphs 16 to 18 and 21 of the plea, where the following is pleaded:

- “16. The first defendant pleads that upon the award of the First Tender to the JV and the acceptance thereof on 23 July 2013, the JV and the plaintiff concluded the Services Contract, which agreement only remained operational for the period from 1 July 2013 to 30 June 2016. The Services Contract thus terminated upon the expiry of such period.
17. Clause 3.2 of the written joint venture agreement concluded between the first to fifth defendants, a copy of which is annexed to the plaintiff’s Particulars of Claim, marked “POC1” (“the JV Agreement”) determined that the operation of the JV and the validity of such agreement would terminate if, *inter alia*, all obligations and rights of the JV and its members in connection with the contract with the plaintiff have ceased.
18. Accordingly, the JV agreement and thus the JV itself terminated on the termination of the Services Contract.”

[23] Again, at paragraph 21 of the plea the following is stated:

“At the time that the Construction Contract was concluded and the Works had to be performed in terms thereof, both the Services Contract and the JV had been terminated. As such, although the first to

⁶ See Van Loggerenberg, *Erasmus Superior Court Practice*, Second Edition, D1-264, and cases referred to at footnotes 1 and 2.

fifth defendants continued to render certain services to the plaintiff in respect of the Works, they did not do so in terms of the Services Contract or as the JV.”

[24] By no stretch of the imagination can these quoted portions be interpreted as an admission regarding the completion date of the contract. As a result, I am unable to agree that, by seeking the amendments, the appellant sought to withdraw an admission or that the amendment was aimed at introducing a change of tact regarding formulation of the appellant’s defences. In any event, the case law shows that even an amendment amounting to the introduction of a new cause of action may be permitted, provided it is *bona fide*.⁸ Nor is there any evidence of *mala fides* by the appellant seeking the amendment.

[25] Since the timeframes of the completion of the Works in terms of the contract are not common cause between the parties, the issue of whether prescription arises is also not common cause, and as a result, the application for leave to amend is not the appropriate stage to decide that issue, but at a later stage once, once amendment has been granted.⁹ It has not been shown that the City will be precluded from raising it at the appropriate time.¹⁰

[26] Moreover, the question of whether the Works as defined in the contract had in fact reached completion stage, is an issue that may properly be taken up as part of the adjudication of the merits. Similarly, whether or not the mediation clause is still applicable to the merits of the dispute between the parties is a matter of interpretation of the contracts between them, which may more appropriately be dealt with at trial stage, not at the stage of deciding whether or not to grant leave to amend. Whether or not the amendment sought is consequential upon the City’s amendment is not the determining factor for the granting of leave to amend, and does not appear to be relevant in relation to the amendments under consideration.

⁸ *OK Motors v Van Niekerk* 1961 (3) SA 149 (T).

⁹ *Stroud v Steel Engineering Co Ltd and Another* 1996 (4) SA 1139 (WLD) said at 1142C-F.

¹⁰ *Transec (Pty) Ltd v Premier of the Province of the Eastern Cape* (416/96) [1998] ZAECHC 4 (16 February 1998) paras 11-14.

[27] To conclude this section, there is no reason to conclude from the record that either of the intended amendments may be characterised as those which would cause an injustice to the City that cannot be compensated by costs, or in respect of which it cannot be put back for the purposes of justice in the same position as it was when the pleading which it is sought to amend was filed.¹¹

Paragraph 1.3 of the notice of motion (Prayer of Conditional Special Plea)

[28] The next amendment sought to be made is in the prayer of the Conditional Special Plea, as follows:

“By deleting the Prayer and by replacing it with “Wherefore the first defendant prays that the action be stayed pending the referral to and finalization of the mediation of any dispute relating to the plaintiff’s claims”.

[29] The unamended prayer reads as follows:

“Wherefore the first defendant prays that the action be stayed pending the resolution or determination of the plaintiff’s claims in terms of clause 12 of the conditions.”

[30] The parties’ arguments in relation to this amendment are linked to the discussion above in relation to paragraphs 1.1 and 1.2 of the notice of motion, and specifically whether, in terms of the Contract Data, mediation is an available course for the parties, and accordingly, the considerations already discussed find application.

[31] An additional observation that may be made here is that, in both the unamended plea and the amendment, the appellant seeks a stay of proceedings, pending resolution by some other means which include mediation. There is no new

¹¹ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* (CCT 212/18) [2019] ZACC 41; 2020 (1) SA 327 (CC) ; 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (24 October 2019) para 89, referring to *Moolman v Estate Moolman* 1927 CPD 27 at 29.

cause of action sought to be introduced by the amendment which was not included in the unamended special plea. And the City has already replicated to the unamended special plea by denying the applicability of mediation. Seen in this light, the amendment sought to be introduced is not one which will place either party in a position they 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.¹²

[32] Moreover, the stay sought amounts to a dilatory plea. It is not the appellant's case that litigation will not be available to the City. What the appellant seeks in the amendment is a stay pending mediation, which is the only other mechanism (other than litigation) mentioned in clause 12. That is in accordance with the provisions of the Contract Data. This is another indication that the City will not suffer prejudice that cannot be cured, because if the amendment is granted, litigation will still continue in due course.

[33] In the answering papers, the City also complained that the appellant delayed by some two months before taking any steps to seek to remedy its plea, thus causing delays. It is not clear in what way the alleged delay has caused any prejudice to the City, and especially those which cannot be cured by costs. After all, a party is entitled to seek an amendment at any stage of the proceedings right up to the moment of judgment.¹³ In any event, we were informed that the main action is years away from being adjudicated, given the number of interlocutory issues raised by the various defendants in the matter.

Para 2.1 of notice of motion (para 15 of the plea)

[34] It is most convenient to deal with this amendment by tracing the development of the pleadings. The City's original particulars of claim stated as follows:

“Ebesa JV successfully tendered to do the professional services which had to be performed in three areas: North, South and East of the City

¹² *Moolman v Estate Moolman* 1927 CPD 27 at 29.

¹³ *Media 24 (Pty) Ltd v Nhleko and Another* (109/22) [2023] ZASCA 77 (29 May 2023) para [16].

during the three-year period commencing on 1 July 2013 until 30 June 2016, with an estimated value of 50 million (excluding vat).”

[35] The appellant admitted this paragraph. Thereafter, the City amended its particulars by adding the underlined portion below, to read as follows:

“Ebesa JV successfully tendered to do the professional services which had to be performed in three areas: North, South and East of the City during the three-year period commencing on 1 July 2013 until 30 June 2016 which professional services were extended until practical completion on 17 July 2019, with an estimated value of 50 million (excluding vat).

[36] It is immediately apparent that the City’s amendment introduced the very issue in respect of which the parties disagree, namely the duration of the contract. This is why the appellant sought to effect its own amendment, by adding the underlined portion below:

“Other than to deny that the Services Contract was extended, the first defendant admits the allegations in these paragraphs.”

[37] The amendment was a consequence of the City’s amendment. It was not a withdrawal of an admission because, as already discussed above, it is abundantly clear from the unamended plea that the appellant does not agree that the contract was extended.

[38] In support of its objection against this amendment, the City relies on the contents of the joint venture agreement, which is annexed to its particulars of claim, to advance its case that the obligations of the members of Ebesa JV have not ceased. In particular, the City refers to clause 3.2 thereof, which provides as follows:

“3. Joint Venture General

...

3.2. Termination

The operation of the Joint Venture and the validity of the Agreement shall terminate if and when it becomes evident that the Joint Venture will not be awarded the Contract or, if the Joint Venture secures the Contract, when all obligations and rights of the Joint Venture and the Members in connection with the Contract and the Agreement have ceased and/or been satisfactorily discharged.”

[39] This termination clause makes it clear that Ebesa JV would only cease when “*all obligations and rights of the Joint Venture and the Members in connection with the Contract and the Agreement have ceased*” or once the contract has been satisfactorily discharged. Based on this clause, the City argues that the fact that the appellant has pleaded that the third and sixth defendants are liable elsewhere in the plea, this means the obligations and rights of the members of Ebesa JV have not ceased. The court *a quo* agreed with the City, stating that there was no basis for the appellant’s denial of the extension of the services contract¹⁴. As I have already mentioned, whether there is merit in either party’s claim regarding the extension of the contract is clearly a matter for determination at trial stage.

[40] The court also noted that the particulars of claim were amended to include the allegations regarding extension of the contract without any objection from the appellant. It is relevant in this regard that, before the City’s amendment to its particulars, the appellant had already pleaded that the services contract, the JV Agreement and Ebesa JV had all terminated on 30 June 2016, as set out in the numerous paragraphs already adverted to earlier. The fact that it did not object when the City sought to amend its particulars by inserting allegations of extension of the services agreement, does not mean that the appellant changed its position as reflected in its plea.

[41] And the fact that the appellant did not agree that the services contract was extended was not a basis for objecting to the City’s amendment. This is in line with

¹⁴ At para [34].

the well-trodden principle of rather allowing amendments to ensure that the real dispute between litigants is adjudicated.¹⁵ Had the appellant objected to the City's amendment, the objection would have been met with the criticisms currently levelled at the City, to the effect that they seek to argue the merits of the matter, in circumstances where the amendment will not result in prejudice that cannot be cured.

[42] Since the appellant had already admitted the contents of the paragraphs which the City amended by alleging extension of the contract, the appellant could only but seek to amend that admission, which it now seeks to do. If the appellant is not permitted to effect a consequential amendment to its plea in keeping with the amended particulars, it is the party which stands to be irreparably prejudiced.

Paragraphs 2.2 and 2.3 notice of motion (paras 23 & 24 of the plea)

[43] The next amendment is a response to paragraph 23 of the particulars of claim, where the City pleaded as follows:

“Ebesa JV performed professional work in respect of the project under the management and control of Andre Broderick who coordinated and managed the project for the City.”

[44] In its plea the appellant originally pleaded as follows:

“Not only did the first to fifth defendants, and not the JV, render services to the plaintiff in respect of the Works, Alwyn Laubscher of the fourth defendant was appointed as the principal agent in respect of the Works.”

[45] The intended amendment is to read as follows:

¹⁵ See *Media 24 (Pty) Ltd v Nhleko and Another* (109/22) [2023] ZASCA 77 (29 May 2023) para 16. *Moolman v Estate Moolman* 1927 CPD 27 at 29. *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 9.

“The first to fifth defendants, and not the JV, rendered services to the plaintiff in respect of the Works.”

[46] Thus effectively, the appellant seeks to delete the allegation that Alwyn Laubscher of the fourth defendant (“*Laubscher*”) was appointed as the principal agent in respect of the Works. The explanation for this amendment is that the original plea was prepared under severe time pressure, and the legal representatives did not have adequate time to properly consider the vast amounts of documents relating to the matter. Nor did they have time to properly consult with the representatives of the appellant or any of the other defendants in the main action. It was only after receipt of the amended particulars that it became apparent to the legal representatives that the allegation that Laubscher was the principal agent was erroneous, and was not supported by the contents of the JV agreement and the services contract.

[47] The City was not satisfied with this explanation, citing the amount of time that the appellant took before delivering its plea, which was some six weeks. It also states that the information regarding the identity of the principal agent constitutes factual information which was at all times within the appellant's knowledge as a member of the Ebesa JV, and should accordingly stand. This is particularly so given that no grounds were advanced for its withdrawal, and given that the appellant failed to explain when and how the mistake arose. The City's overriding objection is that the appellant is seeking to retract an admission which it previously made, which is impermissible and prejudicial to it. The court *a quo* agreed with all the City's objections.

[48] There are several difficulties in this regard. The first concerns whether the allegation made in the plea constitutes an admission. The City's averment that “*Ebesa JV performed professional work in respect of the project under the management and control of Andre Broderick who coordinated and managed the project for the City*”, remains denied, both in the current plea and in the plea that is to be amended. The City had not pleaded that Laubscher was the principal agent, and had instead identified someone else. It was the appellant who volunteered the name

of Laubscher. And the City did not replicate thereto, thus effectively denying the allegations in the plea.¹⁶

[49] Furthermore, Laubscher is the fourth defendant in the main proceedings. Although it does not appear that he has disputed the allegations contained in the unamended plea concerning him, one imagines a scenario where he may well do so in due course. This appears to be more than a possibility given the Service Agreement attached to the particulars of claim, which does not contain Laubscher's name and instead identifies one "PAC Engelbrecht" in his capacity as "Principal Agent/Team Leader". Without deciding the factual correctness of that document, it would be inequitable in those circumstances, if the fourth defendant were bound to an averment made in the plea of the appellant.

[50] As the SCA stated in *Saayman v Road Accident Fund* ¹⁷:

"In the context of civil proceedings an admission is a statement against interest which has the effect of binding the party on whose behalf it is made. If that effect is absent the statement cannot amount to an admission and the well-established rules relating to the withdrawal of admissions cannot apply to it. In fact a withdrawal is, strictly, unnecessary and prejudice to the other party is not an issue. An admission, in its formal sense, also requires at least an intention, explicit or inferred, and unequivocal, to remove a fact that depends on proof from the field of contention."

[51] The allegation sought to be withdrawn was clearly made against the interests of a party other than the appellant, namely Laubscher. This is a clear indication that it is not an admission. It demonstrates why the averment made in the plea concerning the identity of the principal agent cannot be held to be binding upon the appellant (or upon the fourth defendant), and remains an issue that remains for determination at trial.

¹⁶ Uniform Rule 25(2). See Erasmus at D1 Rule 25-1 and D1 Rule 29-4.

¹⁷ *Saayman v Road Accident Fund* (329/09) [2010] ZASCA 123; 2011 (1) SA 106 (SCA); [2011] 1 All SA 581 (SCA) (30 September 2010) para [28].

[52] Furthermore, as is regularly found in trials, there is every possibility that the name of the principal agent may well change during oral evidence. As the court stated in *Robinson v Randfontein Estates Gold Mining Co. Ltd*¹⁸ “*pleadings are made for the Court and not the Court for the pleadings*”, and “*no Court would so interpret the rules, unless thereto compelled by the plain meaning thereof, as to create a situation wherein the Court loses its power to allow such amendments to the pleadings as are designed to ensure that the real issue between the parties is determined.*”

[53] In any event, although the amendment seeks to remove the name of Laubscher from paragraph 23 of the plea, the fourth defendant (Laubscher) remains identified as one of the parties¹⁹ who rendered services to the plaintiff in respect of the Works, though not as part of the Ebesa JV. The appellant’s averment that the Ebesa JV was not involved is not new and is consistent with the remainder of the plea as already discussed earlier. The remainder of the City’s particulars at issue remain denied. Thus, it is difficult to see what prejudice is to be visited upon the City by the amendment.

[54] It is correct that an applicant seeking an amendment must provide a satisfactory explanation for such an application. But, as the case law indicates, that is only one of the factors to be taken into account when deciding whether or not to grant such an application. Another significant consideration which applies in this case is that there has not been a withdrawal of an admission, as already adverted above.

[55] But, an inadequate explanation will not always be a bar to grant of an amendment. As the court held in *Zarug v Parvathie* ²⁰: “*No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even*

¹⁸ *Robinson v Randfontein Estates Gold Mining Co. Ltd*. 1925 AD 173 at 198.

¹⁹ First to fifth defendants are referred to.

²⁰ *Zarug v Parvathie* NO 1962 (3) SA 872 (D) 876 B-C.

though it be a bona fide mistake.’ In my view, the appellant’s explanation falls within the confines of this quote, and, although it may more appropriately be described as negligent or reckless, there is no evidence of *mala fides* in the explanation furnished for its laxity.

[56] There is also to consider that the effect of the refusal of the amendment in this case is that the appellant is now bound by what it has already explained is an error in its pleadings. It is not unforeseeable that, at some stage during the trial, the issue will raise its head, with either the appellant seeking to resile from the allegation, or the fourth defendant seeking to deny it, by leading evidence to refute it. That is the exact opposite of the principal objectives to be taken into account when considering this kind of application, namely a proper ventilation of the real dispute between the parties²¹, and ensuring that as many relevant facts and material as possible are placed before a court, to facilitate and expedite the determination of the real issue between the parties²².

[57] As the court stated in *Whittaker v Roos and Another; Morant v Roos and Another*²³:

“... The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by

²¹ *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) at para 12.

²² *Sondorp and Another v Ekurhuleni Metropolitan Municipality* [2013] ZALAC 13; (2013) 34 ILJ 3131 (LAC) at para 66.

²³ *Whittaker v Roos and Another; Morant v Roos and Another* 1911 TPD 1092 at 1102 - 1103.

counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties.”

[58] The above excerpt exemplifies the practical approach adopted by our courts over the years, now including the Constitutional Court²⁴, to generally allow an amendment 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. I have not found any evidence of *mala fide* motives in the appellant’s application for the amendment. In fact, as I have already indicated, the unamended plea potentially has an adversarial effect on the fourth defendant more than the appellant.

Paragraph 2.6 notice of motion (paras 44 of the plea)

[59] The City amended paragraph 37 of its particulars by replacing the struck-through text below with the bold text:

~~“In consequence of the aforesaid negligence”~~ **[In breach of their aforesaid obligations]**, the video screen wall had to be demolished and rebuilt and a new structural support system had to be built in an already completed area of the new NCC building, with concomitant delays in the practical completion date of the project and financial losses for the City.”

[60] After the amendment above, the appellant sought to amend paragraph 44 of its plea by deleting the struck-through text below, and inserting the underlined portion:

²⁴ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* (CCT 212/18) [2019] ZACC 41; 2020 (1) SA 327 (CC) ; 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (24 October 2019) paras 89 – 90, relying on *Moolman v Estate Moolman* 1927 CPD 27 at 29.

“Other than to deny that it ~~was negligent or~~ breached any of its obligations or duties to the plaintiff and that it is liable for any delay or losses suffered by the plaintiff, if any, the first defendant admits the allegations in this paragraph”.

[61] The struck-through deletion was not opposed and was granted. The underlined insertion remains at issue. The City states that the amendment amounts to retracting an admission, and it will suffer prejudice if it is allowed. In both the notice of objection and the answering affidavit opposing the amendment it is stated that the amendment to City’s particulars of claim did not constitute a basis for an amendment because, save for the word ‘negligence’, it read exactly the same as the original particulars. The court *a quo* effectively agreed with the City, referring to its reasoning in respect of paragraphs 2.1 and 2.2 which I have already dealt with in paragraphs 34 to 42 above.

[62] It is difficult to understand the City's objection in this regard. The appellant continues to admit the City’s allegations that *“the video screen wall had to be demolished and rebuilt and a new structural support system had to be built in an already completed area of the new NCC building, with concomitant delays in the practical completion date of the project and financial losses for the City”*. It also continues to deny negligence and breach of any obligation or duty towards the City. The phrase it wishes to insert amplifies its denial of liability by specifying liability for any delay or losses suffered by the City. Even in the heads of argument on appeal, the City has not specified what admission it claims is sought to be withdrawn by the amendment. No case for prejudice has been made out in my view if the amendment is granted.

Paragraph 2.7 notice of motion (paras 48 of the plea)

[63] The appellant wishes to delete the struck-through portion at paragraph 48 of its plea, as follows:

“The completion of the Works was delayed by numerous factors such as, *inter alia*, ~~the approval of~~ the requisite building plans was delayed

as the applications for rezoning, subdivision and consolidation of the properties on which the Works had to be performed was not timeously attended to recorded or registered by the plaintiff”

[64] It is unconscionable that the City has raised an objection in regard to this amendment, which is quite clearly a stylistic or grammatical amendment. Yet the City states it amounts to a withdrawal of an admission. Similar to the amendment discussed immediately above, the City also complains here that this amendment is not consequential upon the amendment to its particulars. But that is no bar to an amendment. There is no discernible prejudice to be visited by the City if this amendment is granted.

[65] For all the reasons discussed, the appeal ought to succeed.

C. COSTS

[66] There is no reason why costs should not follow the result. The appellant has been successful on appeal and is entitled to its costs on appeal.

[67] When the SCA granted leave to appeal to this Court, it set aside the costs order of the court *a quo* in dismissing the application for leave to appeal. It also reserved the consideration of those costs, plus the costs of the application for leave to appeal in the SCA, as costs in this appeal.

[68] The effect of this judgment is that the City’s objections have been without merit from the start. As a result, the costs order granted against the appellant in the court *a quo* should be reversed, specifically from the delivery of the City’s Notice of Objection on 9 February 2022. Similarly, the costs order granted by the court *a quo* in the leave to appeal should be reversed. Finally, the appellant should not be placed out of pocket and should also be able to recoup its costs in the SCA appeal.

D. ORDER

[69] For all these reasons, I would make the following order:

1. The appeal is upheld;
2. The order and judgment of the court *a quo* is set aside and replaced with the following:

2.1 The appellant is granted leave to amend its Conditional Special Plea as follows:

2.1.1 By deleting the phrase *“failing which such a dispute would first be referred to either mediation or adjudication, and then to arbitration”* in paragraph 2 thereof and by replacing it with *“failing which such a dispute would be referred to mediation”*.

2.1.2 By deleting the phrase *“nor was the dispute ever referred to or determined by mediation, adjudication or arbitration”* in paragraph 3 thereof and replacing it with *“nor was the dispute ever referred to mediation”*.

2.1.3 By deleting the Prayer and by replacing it with *“Wherefore the first defendant prays that the action be stayed pending the referral to and finalisation of the mediation of any dispute relating to the plaintiff’s claims”*.

2.2 The applicant is granted leave to amend its Plea as follows:

2.2.1 By deleting paragraph 15 and replacing it with:

“15. Other than to deny that the Services Contract was extended, the first defendant admits the allegations in these paragraphs.”

2.2.2 By deleting paragraph 23 and replacing it with:

“23. The first to fifth defendants, and not the JV, rendered services to the plaintiff in respect of the Works.”

2.2.3 By deleting the phrase “*Alwyn Laubscher of*” where it appears in paragraph 24.

2.2.4 By deleting the words “*was negligent or*” where it appears in paragraph 44.

2.2.5 By inserting the phrase “*and that it is liable for any delay or losses suffered by the plaintiff, if any*” between “*the plaintiff*” and “*the first defendant*” where it appears in the second line of paragraph 44;

2.2.6 By deleting paragraph 48 and replacing it with:

“48. The completion of the Works was delayed by numerous factors such as, inter alia, the requisite building plans were not approved on time as the applications for rezoning, subdivision and consolidation of the properties on which the Works had to be performed was not timeously attended to, recorded or registered by the plaintiff.”

3. The respondent must pay the costs of and related to the appellant’s application for leave to amend from the date of delivery of its Notice of Objection onwards, including the costs of counsel on Scale B;
4. The appellant must pay the wasted costs occasioned by the amendment of its Plea, including the costs of counsel on Scale B, for the period prior to the delivery of the respondents Notice of Objection;

5. The respondent must pay the costs of the appellant's application for leave to appeal in the court *a quo*, including the costs of counsel on Scale B;
6. The respondent must pay the costs of the appellant's application for leave to appeal in the Supreme Court of Appeal, including the costs of counsel on Scale B;
7. The respondent must pay the costs of this appeal, including the cost of counsel on Scale B.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree. It is so ordered.

T. NDITA
Judge of the High Court

I agree.

per permission
K. SAVAGE
Judge of the High Court

APPEARANCES

For the appellant	:	Adv D. Van Der Merwe
Instructed by	:	Adams Attorneys
		S. Adams

For the respondent : Adv R. Williams
Instructed by : Mosdell Pama & Cox
P. Pama