

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-076725

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
7 September 2025	
DATE	SIGNATURE

In the matter between:

ELELWANI RACHEL RAMUKOSINO NO	First Applicant
MAVHUNGU TRACY NELWAMONDO NO	Second Applicant
TUMELO CHUENE MAGWAI NO	Third Applicant

and

FINANCIAL JUNCTION INVESTMENTS (PTY) LTD	First Respondent
HUBERT SHERRATT	Second Respondent
M AND G INVESTMENTS SOUTHERN AFRICA (PTY) LTD	Third Respondent

JUDGMENT

INTRODUCTION

1. This is an application for leave to amend particulars of claim. It is opposed by the first and second respondents. I will refer to the first and second respondents in this judgment as the respondents.
2. The applicants are the trustees of a family trust. They sue in that capacity and on behalf of the trust. The second respondent is alleged to have been an employee of the first respondent and to have acted, at all material times, in the course and scope of his employment with the first respondent.
3. The applicants seek to withdraw the claims against the fourth defendant and, further, to delete the particulars of claim in their entirety and replace them with a new particulars of claim.
4. The amended particulars of claim would advance three claims against the respondents (and the remaining defendant), with the following common features:
 - 4.1. They are damages claims, based on delict, where the duty of care owed by the relevant defendant to the trust is said

to arise from the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the FAIS Code").¹

4.2. The conclusion of an oral agreement between the first respondent and the trust in December 2010 in terms of which the trust appointed the first respondent to provide it with advice, financial services and intermediary services as defined in section 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act').

4.3. During 2011, and on the advice of the first and second respondents, the trust placed certain investments with the third respondent.

4.4. The first and second respondents failed to comply with their duties in terms of the FAIS Code and were wrongful and negligent by failing to render financial services honestly, fairly, with due skill, care, and diligence and in the interests of the trust.

5. Where the three claims differ is, in summary, as follows:

5.1. Claim A would allege that in June 2012 the first or second respondents, without the necessary authorisation of the

¹ The FAIS Code was promulgated in terms of section 15 of the FAIS Act and, in terms of section 15(2) of that Act, became binding on all authorised financial services providers and representatives upon publication.

trust, caused a portion of the sum invested with the third respondent to be disinvested and reinvested in another investment, incurring fees in the sum of R541,500. This latter amount is claimed as the trust's loss and is claimed from the first to third respondents jointly and severally.

- 5.2. Claim B alleges a disinvestment by the trust in 2015 of a portion of the investment with the third respondent, and the reinvestment of those funds elsewhere, on the advice of the first and second respondents. The advice given is alleged to have not been in good faith, and it is alleged that the trust was not given full and appropriate information regarding the disinvestment and reinvestment, further details of which are set out in the proposed amendment. This conduct is alleged to have been negligent and wrongful and to have caused the trust a loss in the amount of R2 347 172. This amount is described as the damages suffered by the trust as '*the replacement products did not yield the same returns as the ... investments would have earned had they not been disinvested.*' It is claimed from the first and second respondents jointly and severally.

- 5.3. Claim C alleges that the investment made by the trust in 2011 with the third respondent on the first and second respondent's advice, was itself a disinvestment and

reinvestment. The advice given is alleged to have not been in good faith, and it is alleged that the trust was not given full and appropriate information regarding the disinvestment and reinvestment, further details of which are set out in the proposed amendment. This conduct is alleged to have been negligent and wrongful and to have caused the trust a loss in the amount of R6 554 190, a portion of which is constituted by the fees occasioned by the disinvestment and reinvestment, and the remainder of which is described as the '*... amount the trust would have earned from the ... investments had these investments not been terminated.*' The amount of R6 554 190 is claimed from the first and second respondents jointly and severally.

6. The respondents raised nine objections to the proposed amendment, which can be conveniently dealt with in four groups.

- 6.1. The first, third and sixth objections were directed at claims A, B and C respectively. These complaints contend that as pleaded, an oral agreement governs the relationship between the applicant and the first respondent, and a delictual claim is hence not competent. It is contended that the amendment, if effected, would render the particulars of claim vague and embarrassing or result in the particulars of claim failing to disclose a cause of action.

- 6.2. The second, fourth and seventh objections contend that the amendment seeks to introduce prescribed claims. It is argued by the respondents that the cause of action articulated in claim A arose on 4 June 2012, in claim B on 25 June 2015 and in claim C during 2011, and hence these claims had prescribed prior to the service on the respondents of the notice of intention to amend.
- 6.3. The fifth and eighth objections are to the quantification of the damages in claims B and C.² The respondents contend that insufficient facts have been pleaded to enable them to reasonably assess the quantum of the claims. In particular, it is contended that there is no indication as to how the amounts are calculated, nor are there any allegations regarding the period over which the damages are calculated or the amounts the investments realised following reinvestment, or could have realised but for reinvestment. It is contended that for these reasons the particulars of claim if amended would be vague and embarrassing and would not comply with Rule 18(10).
- 6.4. A ninth objection was that the respondents have been prejudiced by alleged delays by the applicants in the bringing of this amendment.

² No complaint is taken to that portion of the damages in claim C which relates to fees.

7. The applicants contended that the respondents' answering affidavit did not admit, deny or confess and avoid the allegations in the founding affidavit in the application for amendment and that, therefore, I should accept the allegations in the founding affidavit as correct. As appears from what follows, I do not consider the correctness or otherwise of the allegations in the application for amendment to be material to the issues I am called upon to decide. I therefore do not need to, and do not decide on, the correctness of the aforementioned argument.

THE APPROACH TO AMENDMENTS

8. The court exercises a discretion in regard to amendments and, in considering whether to grant or refuse an amendment, will lean in favour of granting it if doing so will allow the real issue between the parties to be decided.³
9. But, an amendment must raise a triable issue – it must be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings, in the sense that the issue is viable and relevant or will probably be covered by the available evidence.⁴
10. The applicants placed reliance on *Affordable Medicines Trust and Others v Minister of Health and Others*⁵ in which the Constitutional Court held that amendments will always be allowed unless *mala fide*

³ *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (N) at 638

⁴ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) 462–463

⁵ 2006 (3) SA 247 (CC)

or unless the amendment would cause an injustice to the other side which cannot be cured by an appropriate order for costs.⁶ The introduction of excipiability into a pleading would constitute prejudice justifying the refusal of an amendment.⁷

THE OBJECTIONS TO THE DELICTUAL CLAIMS

11. The respondents contend that the manner in which the proposed amended cause of action is pleaded demonstrates that the delictual claim is derived from the failure to adhere to a duty of care that is owed by reason of a contractual relationship, and that therefore the applicants are precluded from claiming in delict. The proposed amendment pleads, so it is argued, that the FAIS Code and the duties it entails have been incorporated as contract terms.
12. This is because in respect of claims A, B and C, it is proposed to be pleaded by the applicants that it was a material term of the agreement between the parties that the first respondent would render the services for which it was appointed in compliance with the FAIS Act and any code of conduct applicable to persons in its position.
13. The applicants, on the other hand, contend that the legislative scheme, and in particular article 3(1)(d) of the Code, requires the conclusion of a contract between clients and financial services providers and, once

⁶ At para 9

⁷ *De Klerk & Another v Du Plessis & Others* 1995 (2) SA 40 (T) at 43I-44B and *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at para 9

such a contract is concluded, it imposes on financial advisors the duties contained in the FAIS Code. Those duties, so it was argued, are extra-contractual. The contract brings about the relationship between client and financial advisor, and the FAIS Act imposes on the advisor in such a relationship the duties contained in the FAIS Code.

14. The pleading is capable of the reading which the applicants contend for:

14.1. The pleading, read as a whole, makes plain that the claim advanced is intended to be one in delict and that the duties imposed by the Code are contended to arise extra-contractually. That is evidenced by the proposed paragraph 11 which states that the claims are for damages based on delict against the defendants who owe a duty of care in favour of the trust in terms of the FAIS Code.

14.2. The portion of the pleading which would state that it was a term of the agreement between the parties that the services would be rendered in terms of the FAIS Code does not necessarily mean, as the respondents contended, that the terms of the Code became terms of the contract. It is capable of being interpreted as alleging that the first respondent would conduct itself reasonably, where reasonableness is to be measured with reference to the FAIS Code.

15. That the pleading is capable of being read in this way does not, however, address the respondents' contention that the conclusion of the contract precludes a reliance on a delictual claim.
16. The existence of a contractual relationship between the applicants and the respondents does not, without more, preclude a claim in delict.⁸ Unterhalter J, as he then was, in *Trio Engineering Products Inc v Pilot Crushtec International (Pty) Ltd*⁹ held that it is untenable to adopt so strict a position that a contractual relationship displaces every duty of care in delict. It was held that there is no warrant to move from the unattractive proposition that every contractual duty attracts a co-extensive duty in delict (merging contract and delict), to the position that the assumption of a contractual duty is repugnant to the recognition of any delictual duty.¹⁰ Duties may arise by reason of statute or at common law that compliment or are not repugnant to contractual obligations and hence may be concurrent.¹¹ The applicants contended for this latter situation.
17. In *Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*¹² Brand JA held, with reference to the decision in *Lillicrap*, that the existence of a contractual relationship enables parties to regulate that relationship themselves, including provisions as to their respective

⁸ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496G-I

⁹ 2019 (3) SA 580 (GJ)

¹⁰ At para 27

¹¹ *Ibid*

¹² 2006 (3) SA 138 (SCA)

remedies. There is thus no policy imperative for the law to superimpose a further remedy in delict.¹³ The court went on to hold that in cases of pure economic loss there was no need to extend aquilian liability so as to recognise a duty not previously recognised in law where the parties were capable of regulating such duties contractually.¹⁴

18. To quote from *Lillicrap*:¹⁵

‘... the Aquilian action does not fit comfortably in a contractual setting like the present. When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of the relationship which they are creating. This does not of course mean that the law may not impose additional obligations by way of naturalia arising by implication of law, or, as I have indicated above, those arising ex delicto independently of the contract. However, in general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party. If the Aquilian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the bonus paterfamilias. How is the latter standard to be determined? Could it conceivably be higher or lower than the contractual one? If the standard imposed by law differed in theory from the

¹³ At para 18

¹⁴ At para 21 - 24

¹⁵ *Supra* at 500F-501H

contractual one, the result must surely be that the parties agreed to be bound by a particular standard of care and thereby excluded any standard other than the contractual one. If, on the other hand, it were to be argued that the bonus paterfamilias would always comply with the standards laid down by a contract to which he is a party, one would in effect be saying that the law of delict can be invoked to reinforce the law of contract. I can think of no policy consideration to justify such a conclusion....

Apart from defining the parties' respective duties (including the standard of performance required) a contract may regulate other aspects of the relationship between the parties. Thus, for instance, it may limit or extend liability, impose penalties or grant indemnities, provide special methods of settling disputes (eg by arbitration) etc. A Court should therefore in my view be loath to extend the law of delict into this area and thereby eliminate provisions which the parties considered necessary or desirable for their own protection. The possible counter to this argument, viz that the parties are in general entitled to couch their contract in such terms that delictual liability is also excluded or qualified, does not in my view carry conviction. Contracts are for the most part concluded by businessmen. Why should the law of delict introduce an unwanted liability which, unless excluded, could provide a trap for the unwary?'

19. I must thus decide, as I understand these authorities, whether the proposed amendment seeks to claim for a loss that occurred pursuant to or in the performance of the contract concluded between the applicants (as trustees) and the first respondent. If it does, the remedy would be a claim in contract for contractual damages. If, on the other

hand, the proposed claim is one which arises between parties to a contract, but independently from the contract as a result of additional or complementary duties, the remedy would be a delictual claim.¹⁶

20. The amendment provides for the conclusion of an oral agreement in terms of which the trust appointed the first respondent to provide it with advice, financial services and intermediary services as defined in section 1 of the FAIS Act.
21. Claims B and C seek to allege a disinvestment and reinvestment by the trust on the advice of the first and second respondents. The advice was provided because of the contractual relationship between the parties and in terms of that contractual relationship. The contract had as a term the provision of advice by the first and second respondents to the trust, and the disinvestment and reinvestment was carried out pursuant to advice given by the respondents. This is the type of situation contemplated by *Lillicrap* where contractual remedies must be pursued and a delictual claim would not be permissible. In this situation the FAIS Code obligations are not complimentary to the contractual obligations, but rather give content to the contractual obligations as contractual terms.
22. Claim A relates to an unauthorised withdrawal from one investment and reinvestment into another investment, causing an alleged loss.

¹⁶ See, in this regard, the analysis of Moorcroft AJ in *Devland Cash and Carry (Pty) Ltd v G4S Cash Solutions SA (Pty) Ltd* [2023] ZAGPJHC 754 at para 20 – 25.

That disinvestment and reinvestment was not caused by advice and the claim is in this respect distinguishable from claims B and C. Nevertheless, the proposed claim alleges conduct contrary to the mandate in the form of an unauthorised or unmandated withdrawal. This claim is therefore also founded on a contractual, and not a delictual, breach.

23. The applicants do not contend that the respondents would have owed the trust the duties in the FAIS Code absent a contract between them.¹⁷
24. It follows from the aforesaid that the respondents' first, third and sixth objections are upheld. The proposed amendments would bring about vagueness and embarrassment in that they would impermissibly claim in delict that which the pleading indicates ought to be contractual damages.
25. I do not, in reaching this finding, make any decision on the competence of that portion of claim A which seeks to claim damages from the third respondent.

THE PRESCRIPTION OBJECTIONS

26. If the proposed claims have prescribed, the amendments ought to be refused.¹⁸ But this is where it is clear, or common cause, that the claim

¹⁷ *Nashua Mobile (Pty) Ltd v GC Pale CC t/a Invasive Plant Solutions* 2012 (1) SA 615 (GSJ) at para 24 - 28

¹⁸ *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 796H-I

as proposed to be amended has prescribed. To quote Flemming DJP in *Stroud v Steel Engineering Co Ltd and Another*,¹⁹ *'once prescription is not common cause, the plaintiff should not be deprived of his chance to put his claim before the Court because of apparent probabilities at the time when amendment is considered.'*

27. The respondents accept that the applicants do not make any averments in the proposed amendments as to when they gained knowledge of the debt. Certain inferences are drawn by the them, however. They contend that:

27.1. The applicants' proposed amendment in respect of Claim A was for a debt that arose on 4 June 2012. The applicants *'should'* have had knowledge of the payment of fees to the first respondent on that date. Accordingly, claim A became prescribed by latest June 2015.

27.2. The applicants' proposed amendment in respect of Claim B was for a debt that arose on 25 June 2015. The applicants *'should'* reasonably have had knowledge of the claim when the disinvestment was made on the applicants' instructions and accordingly, claim B became prescribed by latest June 2018.

27.3. The applicant's proposed amendment in respect of Claim C

¹⁹ 1996 (4) SA 1139 (WLD) at 1142C-F

was for a debt that arose latest December 2011. The applicants '*should*' reasonably have had knowledge of the claim when the disinvestment was made on the applicants' instructions. Accordingly, Claim C became prescribed by latest December 2014.

28. It was further contended that the application for amendment contained contradictory averments as to the date on which the applicants gained knowledge of the debt. The founding affidavit is argued to have put the date at 2022 while the replying affidavit puts the date at a time '*after the summons was served.*'

29. The criticism of the affidavits, even if correct, does not provide a basis for upholding the objections based on prescription:

29.1. There was no obligation on the applicants to anticipate prescription. As the *Stroud* judgment referred to above indicates, prescription is not an issue until it has been pleaded.²⁰ The applicants therefore did not have to make any averments in the proposed amendment as to when they became aware of the debt and therefore would also not have needed to do so in the application for leave to amend.

29.2. Nor do the allegedly contradictory averments assist in determining when the applicants acquired the necessary

²⁰ At 1142D-F

knowledge for prescription to have commenced running.

29.3. The affidavit is deposed to by the trust's attorney and not the trust, and it is the knowledge of the trust which is relevant to prescription.

29.4. Finally, what is stated in the affidavits is the attorney's opinion as to when prescription began to run. His opinion cannot impact on when prescription actually began to run.

30. The use of '*should*' by the respondents in contending for prescription is demonstrative of the fact that the commencement of prescription is not common cause and is something which is best pleaded and canvassed at trial.

31. In *Le Roux and Another v Johannes G Coetzee & Seuns and Another*²¹ the Constitutional Court held that at the time that incorrect advice is given, or a mandate is purportedly discharged, a client would generally not know that the advice was incorrect or that the mandate was not properly discharged. Either may have occurred as a matter of fact, yet the knowledge and appreciation that the advice was incorrect or that the mandate was not properly discharged may only emerge much later. Similarly, with respect to claim A, if the impugned transaction was unauthorised, the trust may well not have been aware of it at the time that it occurred.

²¹ 2024 (4) SA 1 (CC) at para 64 and 65

32. It is thus not appropriate for me, at amendment stage, to assume facts, nor are amendment applications intended to determine factual issues.²²

33. The second, fourth and seventh objections are thus dismissed.

THE QUANTIFICATION OF DAMAGES

34. The respondents contend that Claims B and C contain no more than a bald averment as to the quantum of the alleged loss and that it is impossible for them to reasonably assess the quantum of the applicants' alleged damages.

35. It is argued that it was incumbent on the applicants to have pleaded at least the following information:

35.1. The period over which the so-called loss or damages were calculated;

35.2. what the yield was or would have been had the funds not been disinvested; and

35.3. the return which was obtained in respect of the replacement products.

36. Because this detail is lacking, the respondents contend that the proposed amended Claims B and C do not comply with Rule 18(10)

²² *Ergo Mining (Pty) Ltd v Ekurhuleni Municipality and Others* [2020] 3 All SA 445 (GJ) at para 16

and are vague and embarrassing.

37. Rule 18(10) is applicable to all claims for damages. It is therefore necessary that the pleading enable the counterparty to reasonably assess the quantum of damage claimed. The extent of the detail required in the pleading will depend upon the complexity of the damages claim.
38. It has been held that where a loss is predicated on a counterfactual (as this proposed amendment is), the pleading must set out the essential facts and assumptions relied upon that support the quantum of the loss claimed.²³
39. It was submitted by the applicants that the court ought to take into account in determining this objection the relationship between the parties, the duties owed by the respondents to the trust and the profession of the respondents. I am not aware of any authority which permits of a departure from the requirements of Rule 18(10) because of factors such as these, and I was not referred to any such authority.
40. Claim B, as indicated already, is premised on a disinvestment and reinvestment by the trust, on advice given, in June 2015. The trust alleges that it would not have disinvested and reinvested but for the advice given to it. It is then to be pleaded as follows:

'3.14.2 the Trust suffered damages in the amount of R 9,193,994.78.

²³ *Khourie v Levine and Others* [2018] ZAGPJHC 418 at para 16

The calculation for same is set out under annexure "PC6".

3.15 The Trust suffered damages because the replacement products did not yield the same high returns as the Prudential investments would have earned had they not been disinvested.'

41. PC6 is described as the '*Calculation of Loss suffered by the ... trust*'. The heading to the calculation that follows is '*But for calculation had the R 40,000,000 remained in Prudential until 9 July 2020*'.
42. PC6 then proceeds to set out the products the funds were invested in, the initial contributions in each product as at 25 June 2015 (the disinvestment date), the returns on such investments for a period up to 9 July 2020 (this is presumably a notional return) and the fees that would have been incurred over the period. A closing value is given as at 9 July 2020.
43. A summary is then set out as to the movement on the reinvestment and its closing balance as at 9 July 2020 is provided. The actual return is then subtracted from the notional return to yield the damages amount claimed.
44. What I have set out is merely a summary of that which appears in PC6. It spans 11 pages and contains far more detail than that which I have described above, including the rates of returns which have been used for the various funds, the source from which those rates were obtained, the time periods they are said to be applicable for and monthly detail

of the account movements.

45. It is clear from the pleading that the amount claimed is the difference between what the original investment would have realised had it remained in place, and what was realised after disinvestment and reinvestment. PC6, which must be read with the pleading, contains the detail which the respondents contend needs to be alleged: it puts the period as being from 25 June 2015 – 9 July 2020 and gives the values of the two competing investments at the end date of 9 July 2020.

46. I am satisfied that the particularity contemplated by Rule 18(10) is contained in the pleading as read with PC6 and the fifth objection thus falls to be rejected.

47. Claim C arises from a disinvestment and reinvestment, on advice, in August 2011. The amounts disinvested are specified. It is alleged that the trust would not have disinvested and reinvested but for the advice given to it. Proposed paragraph 4.14.2 of the amendment would read as follows:

‘the Trust suffered damages in the amount of R 9 500 000,00, being the amount the Trust would have earned from the terminated products with effect from the date on which each of the terminated products were terminated to 31 July 2023 had the terminated products not been terminated and the relevant amounts remained invested with Old Mutual Life Assurance Company (South Africa) Limited’.

48. I agree with the respondents that it is at least necessary for the pleading to describe the period over which the so-called loss or damages were calculated. Indeed the applicants' counsel conceded as much. Without an end date for the calculation there cannot be a computation of the alleged loss of profit. The start date is given as the date of disinvestment and the end date is given in the pleading as 31 July 2023. This aspect is therefore addressed by the pleading.
49. Once one knows the period over which the loss has been calculated, and that the loss is calculated as the difference between what was realised and what could have been realised but for the disinvestment and reinvestment, the further particularity which the respondents seek, namely the amount of the notional return and the amount of the actual return, is *facta prabantia* rather than *facta prabanda*.
50. The respondents can assess the quantum of the claim on the information provided. The eighth complaint thus falls to be dismissed.

THE DELAY COMPLAINT

51. The ninth objection was not pressed in argument before me, as a self-standing basis upon which to refuse the amendments sought. Rather it was raised, as I understood it, as a factor to be taken into account, together with the other objections raised, and as relevant to costs.
52. This is in keeping with the approach that an amendment will be granted (even at a late stage) if it leads to a proper ventilation of the dispute

and if it does not occasion an injustice to the opposing party which cannot be remedied by an appropriate costs order.²⁴ Delay on its own is not a basis for refusing an amendment.²⁵

CONCLUSION

53. The respondents had excepted to the applicants' unamended particulars of claim. They contend that the proposed amendment in issue is an attempt to overcome the fact that the initial particulars of claim were excipiable, and by seeking this amendment they impliedly concede that the exception was validly raised.
54. I was thus urged by the respondents to decide that exception. It was argued that, at the very least, the respondents are entitled to the costs of that exception. It was common cause, however, that the exception had not been set down for hearing by either party.
55. The applicants' counsel submitted that the applicants were not ready to address the exception and would be prejudiced were I to entertain the exception. Given that it had not been set down, the applicants were not required to be prepared to deal with the exception.
56. I indicated to the parties during the course of argument that I would not decide the exception and that I would provide my reasons for declining to do so in this judgment.

²⁴ *Kasper v Andr  Kemp Boerdery* CC 2012 (3) SA 20 (WCC) at para 70

²⁵ *Commercial Union Assurance Co Ltd v Waymark* NO 1995 (2) SA 73 (TkGD) at 77A-C

57. As the exception had not been set down for hearing, as it could have been, it would be prejudicial to the applicants' rights to hear argument on it. Were the amendments to be refused (as in the result they will be), the exception would become a matter for the parties to address in the manner they each deem fit. Were the amendments allowed, it would remain available to the respondents to set down the exception for the purposes of having costs determined, if agreement cannot be reached between the parties on the costs of that exception.
58. I was also not prepared to assume that the exception was validly taken merely because an amendment is being sought.
59. I was asked by the applicants, should some objections succeed and others fail, to grant that part of the proposed amendments to which there is no valid objection. Given that I have upheld the first, third and sixth objections, and that these objections go to the very basis on which all three claims are formulated, I cannot accede to this request. The applicants will have to consider how best to advance their claims in the light of the conclusions I have reached.
60. There was no objection to the withdrawal of the claims against the fourth defendant, but that is also not an amendment I can allow as it was given effect to by way of deleting the particulars of claim in their entirety and replacing them with particulars which did not articulate a claim against the fourth defendant. The proposed amendment further records that *'a notice of withdrawal of claims against the fourth*

defendant will be served in due course.' Thus, if the applicants wish to pursue that withdrawal (to the extent that they have not already done so), it can be achieved by service of a notice of withdrawal.

61. As the applicants sought leave to amend, and as the respondents have been successful in three of the objections taken, and as the objections were not unreasonably taken, it is appropriate that the applicants pay the costs of this application.

62. The respondents sought costs on scale C while the applicants contended that scale B would be the appropriate scale. Wilson J in *Mashavha v Enaex Africa (Pty) Ltd*²⁶ held that scale A is the default costs scale which ought to be departed from only where a case is unusually complex, important or valuable. The judgment also indicates that value and importance must be judged objectively and with reference to evidence.²⁷ No such evidence was put before me.

63. The matter did involve some complexity. The heads were not, however, particularly lengthy nor was oral argument. Given the nature of the issues, costs on scale B is appropriate in the circumstances.

64. In the result, I make the following order:

64.1. The respondents' second, fourth, fifth, seventh, eighth and ninth grounds of objection to the applicants' proposed

²⁶ 2025 (1) SA 466 (GJ) at para 16

²⁷ At para 20

amendments contained in the notice of objection dated 30 July 2024 are dismissed;

64.2. The respondents' first, third and sixth grounds of objection to the applicants' proposed amendments contained in the notice of objection dated 30 July 2024 are upheld;

64.3. The applicants' application for leave to amend their particulars of claim is dismissed; and

64.4. The applicants are to pay the costs of this application on scale B, inclusive of the costs of two counsel where so employed.



K D ILES
Acting Judge of the High Court, Johannesburg

Appearances:

On behalf of the applicants:

K Tsatsawane SC
Y Saloojee

Instructed by:

Webber Wentzel Attorneys

On behalf of the 1st and 2nd respondents:

P Van der Berg SC
A Roestorf

Instructed by:

Thyne Jacobs Inc

Date of hearing:

20 August 2025

Date of judgment:

7 September 2025