

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A25/2025
34554/2018

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

In the matter between:

COVEC S.A. (PTY) LTD

Appellant

and

AFRI-DEVO (PTY) LTD

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 October 2025.

Flynote: Appeal against an exercise of a discretion contemplated in Rule 28(10) of the Uniform Rules of Court. A replication is a pleading to be filed where necessary. It is a pleading informed by a plea. It is not a pleading to be amended because of the evidence led at a trial. Where an amendment would lead to a prejudice or injustice, such should not be allowed by a Court. Allowing or refusing an amendment of a pleading involves an exercise of discretion. A Court of appeal is loath to interfere with an exercise of discretion

by the Court below, unless it is demonstrated that the exercise is based on wrong principles, *mala fide* or capricious. Held: (1) The appeal is dismissed with costs to be taxed or settled at scale B.

JUDGMENT

MOSHOANA, J (MOLOPA-SETHOSA J AND LENYAI J CONCURRING)

Introduction

[1] Before us is an appeal with leave of the Supreme Court of Appeal granted on 5 February 2025. This appeal involves an attack against an exercise of a discretion by the erudite Madam Justice Potterill who was sitting alone. Potterill J, in a rather lengthy and well-reasoned written judgment, dismissed an application seeking leave to amend a replication midstride a trial. With considerable regret, the entire wheel of the trial was spokes pending the outcome of the present appeal.

[2] Although the respondent failed to deliver heads of argument timeously, Mr Richards appeared before us on behalf of the respondent and sought to be permitted to make oral submissions. The permission sought was granted.

Background facts

[3] The present appeal fulcrums on a procedural aspect of the partly heard action proceedings, as such, it shall be obsolete to punctiliously provide a full rendition of the factual matrix appertaining the dispute involving the parties before us. To do so will serve no useful purpose other than to elongate this judgment in the impermissible circumstances. The bulk of the facts appertaining the entire dispute is usefully recorded in the written judgment of Potterill J. The salient facts relevant to this appeal may be condensed as follows.

[4] The relationship between the appellant and the respondent is governed by the terms of a written agreement concluded on 17 June 2014. In terms of that written agreement, the appellant was to supply, deliver, install and maintain the works, as

described in the written agreement, at an agreed price of R 16 770 118.60, which was inclusive of Value Added Tax (VAT).

[5] At some point during the currency of the written agreement, a dispute sparked between the parties regarding the performance of the terms of the written agreement. Such a dispute culminated in the appellant instituting action proceedings against the respondent, seeking certain declaratory reliefs and payment of certain sums of money. Of pertinence to the present appeal, on 18 May 2018, the appellant caused a combined summons to be issued against the respondent. The respondent delivered a plea and a counterclaim against the appellant.

[6] Ultimately, in addition to a plea to the counterclaim, the appellant delivered a replication to the respondent's plea. Pleadings were ultimately closed, and the matter was enrolled for trial. The trial was allocated to our sister Potterill J. Midstride the trial, following the evidence of the appellant's expert witness, Mr Langely, an application for the postponement of the trial was sought by the appellant in order to consider an amendment to its replication. The postponement was granted.

[7] In the intervening period, a document dated 6 January 2015 was unearthed by the appellant, which document sought to suggest that the delivery period was within the period 10 February 2015 to 6 March 2015. The contents of this unearthed document were already testified to by one Mr Venter. On the appellant's contention before us, the evidence of Mr Venter was not controverted during cross-examination.

[8] On 30 January 2024, the appellant gave notice of intention to amend its particulars of claim as well as the replication. On 7 March 2024, the respondent delivered an objection to the intended amendment to the replication. The objection recorded the following:

"1 The proposed amendment is aimed at introducing a *new cause of action* which is impermissible in circumstances where the defendant will *be prejudiced* which cannot be cured by a tender for costs.

2 The amendments proposed to the plaintiff's replication, *also introduces a new cause of action*, alternatively amending the plaintiff's current cause of action, will render the plaintiff's *pleadings excipiable*.

3 The introduction of new facts and documents at this stage of the proceedings some six years after institutional (*sic*) proceeding (whist the plaintiff's third witness is testifying) will delay the action and it will *not be in the interest of justice*.

4 The proposed amendment may necessitate the plaintiff applying to recall witnesses which will be prejudicial to the defendant in delay (*sic*) proceedings.

5 The proposed amendments would not increase the plaintiff's prospects of success in the action.

6 The proposed amendments are *brought inordinately late* in the proceedings without any explanation offered.

7 The proposed amendment constitutes a *knee jerk reaction* to the discrepancies in the plaintiff's case as exposed during the evidence and cross-examination."

[9] The objection prompted the appellant to launch an application seeking leave of the Court to amend the replication. The contents of the proposed amendment were usefully set out by Potterill J in her written judgment. Yet again, it shall be obsolete to regurgitate the contents thereof in this judgment. After hearing the application, Potterill J delivered the impugned judgment.

The appellant's submissions

[10] Before us, the appellant submits that the Court below misconstrued its particulars of claim and the proposed amendment to its replication. Owing to the contended misconstruction, the Court below came to a wrong conclusion, so went the submission. The appellant attacked a number of findings made by the Court below. Briefly, those findings are:

10.1 bringing the replication in line with defences;

10.2 introducing a new agreed date for the delivery of the BESS contrary to what is set out in the particulars of claim. The email sought to be introduced does not reflect the date of 6 March and does not support the alleged date of 6 March;

- 10.3 contrary to the *Shifren* clause, the communication was not agreed to in writing;
- 10.4 witnesses would need to be recalled to prove the dates mentioned in the email communication;
- 10.5 the appellant should have pleaded implied waiver and it also bore the onus to prove waiver;
- 10.6 undertaking not to take legal steps is not a recognised defence to avert reciprocity;
- 10.7 failure to plead contractual preclusion to raise late delivery and raising of new issues not allowed midstride the trial; and
- 10.8 the defendant stands to suffer prejudice not compensable by a costs order.

Respondent's submissions

[11] As alluded to at the dawn of this judgment, Mr Richards made oral submissions. In short, he submitted that when refusing leave to amend, the Court below exercised a discretion, and this Court is not permitted to interfere with such an exercise of discretion in the absence of a known legal basis to do so. Additionally, he submitted that the amendment, if allowed, would lead to an injustice. Ultimately, he contended that the Court below was correct and did not materially misdirect itself when refusing leave to amend.

Analysis

[12] For the purposes of this judgment, the pertinent rule is the one that allows application for leave to amend at a late stage. In order to perceptively consider the present appeal, it is apposite to consider the text of the implicated rule. Rule 28(10) of the Uniform Rules of Court provides as follows:

“(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.”

[13] Both counsel that appeared before us are congruent with each other that the issue of granting and or refusal of leave to amend involves an exercise of a true or wide discretion. When a judge opts to grant or refuse leave to amend, the judge is, by law, entitled to do so. This is similar to the granting or refusing of a postponement

or costs award. Either option is valid in law. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,¹ the Court expressed itself in the following terms:

“A Court of appeal *is not entitled to set aside the decision of a lower court* granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower Court, have come to a different conclusion; *it may interfere only* when it appears that the lower Court had not *exercised its discretion judicially*, or that it had been *influenced by wrong principles* or a *misdirection on the facts*, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”(footnote omitted)

[14] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,² in complete reverberation to what *National Coalition* stated, the Court expressed itself in the following terms:

“[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised -

‘judicially, or that it had been influenced by wrong principles...’³

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] In *Florence Moseneke* DCJ stated:

‘Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is *at odds with the law*. If the impugned decision lies within the range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This

¹ 2000 (2) SA 1 (CC) at para 11.

² 2015 (5) SA 245 (CC).

³ As stated in *National Coalition* above n 1 at para 11.

principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.”

[15] On the strength of the principles enshrined above, the present appeal falls to be dismissed without more. However, as held by the Constitutional Court in *Cusa v TaoYing Metal Industries and Others*,⁴ this Court is duty bound to deal with all that was argued before it. Generally, an amendment, if granted, is aimed at ensuring a proper ventilation of issues. Inasmuch as rule 28(10) allows an amendment to be granted at any time before a judgment, it would not lead to a proper ventilation of issues, if leave to amend is launched and sought to be granted six years later, as it was the case here. Particularly in the circumstances where, as it is the case here, the contemplated amendment was actuated by the leading of unfavourable evidence during a trial. The general approach to be applied in amendment applications was perfected in *Moolman v Estate Moolman*.⁵ The following was stated:

“ . . . the 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*.”

[16] This Court is unable to fault the decision of the Court below. It is not at odds with the law. Having considered the pleadings in totality, as a Court considering an amendment should do, it is indeed correct that new averments were made in the proposed replication. There can be no doubt that the terms of a written agreement can only be amended as per the *Shifren* clause. It is indeed correct that a defence of waiver must be properly pleaded and proven. Undoubtedly, the amendment of a replication would yield a substantial injustice or prejudice to the respondent.

[17] Procedurally, a replication follows a delivery of a plea. It is a pleading aimed at the allegations made in a plea and not simply to join issues or plead a bare denial of

⁴ 2009 (2) SA 204 (CC).

⁵1927 CPD 27 at 29.

the allegations made in the delivered plea. Generally, a plaintiff makes a case to be met by the defendant in the combined summons. In terms of rule 25(1), a replication is a pleading that arises out of necessity. On the appellant's own submission, the evidence relating to the email of 6 January 2015 was factored into the issues by the supposedly uncontroverted evidence of Mr Venter. By necessary implications, it is obsolete for the appellant to perfect, as it were, its newly found case of waiver by amending its pleadings. After replication, there is no other pleading to be allowed for the respondent. Therein lies the palpable prejudice and injustice should the amendment be allowed. The rule allowing amendments must not be used as a musical chairs game. A party is not allowed to mould its case as the trial progresses. On the submission of Mr Kruger for the appellant, the proposed amendment was ignited by the evidence led by Mr Langely and Mr Venter. It is not necessitated by a plea, as it should be the case, in line with rule 25(1).

[18] Generally, pleadings exist to outline the issues for the parties and for the Court. It is for that reason that a party is not permitted to plead a particular case and lead evidence on a different case. Equally, a party should not be permitted to 'close the gap' as it were, when a clash occurs between the pleaded case and the evidence led. Section 34 of the Constitution guarantees everyone a right to a fair hearing and the resolution of a dispute by the application of the law. It is extremely prejudicial and unjust for a party to contend with goal post shifting exercise during a trial. Such conduct, if permitted, would not only destroy the substratum of procedural law, but shall be at odds with the section 34 right.

[19] Another consideration is that rule 23(1) provides that where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action, the opposing party may deliver an exception thereto. On the principle enshrined in *Moolman*, allowing an amendment of the replication will not put the parties back to where they were before the replication. The issue of another agreed term for delivery will not only be in direct contrast with the case set out in the combined summons, but if allowed, it will force the respondent into the terrain already passed of invoking rule 23(1). Such is prejudicial to the respondent, and no order of costs shall compensate the respondent. It was perfectly within the rights of

the respondent to object to the proposed amendment. In upholding the objection, the Court below did not err. Resultantly, the appeal falls to be dismissed with costs.

[20] For all the above reasons, I make the following order:

1. The appeal is dismissed.
2. The appellant is to pay the costs of this appeal to be taxed or settled on scale B.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

M D LENYAI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.

APPEARANCES:

For the Appellant:

Instructed by:

A N Kruger

Snyman De Jager Inc, Pretoria

For the Respondent:

Instructed by:

C Richards

Des Naidoo and Associates, Sandton

Date of the hearing:

07 October 2025

Date of judgment:

17 October 2025