IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 2014/2023

In the matter between

FREE STATE WHEELS (PTY) LTD	**PLAINTIFF**
and	
WRC RENTALS (PTY) LTD	**FIRST DEFENDANT**
MARNUS NICO COETZEE	**SECOND DEFENDANT**
DANIËL BENJAMIN GROBLER	**THIRD DEFENDANT**
AXE HOLDING (PTY) LTD	**FOURTH DEFENDANT**
WRC 2020 INVESTMENTS (PTY) LTD	**FIFTH DEFENDANT**
LAYSAN LIMITED	**SIXTH DEFENDANT**

Neutral Citation: *Free State Wheels (Pty) Ltd v WRC Rentals (Pty) Ltd and Others* (2014/2023) [2023] ZAFSHC 378 (26 November 2025)

Coram: VAN RHYN J

Heard: 28 August 2025

Delivered: 26 November 2025

Summary: Application for leave to amend particulars of claim. Objection to proposed amendments – on basis that amendments were delayed, will have the effect of withdrawing admissions previously made and renders the particulars of claim vague and embarrassing alternatively lacking the necessary averments to sustain a cause of action. Provisions of rule 18 of the Uniform Rules of Court that every pleading shall have a clear and concise statement of material facts – with sufficient particularity to

enable the opposite party to reply thereto – applicable. Proposed amendment will not contribute to the clarification of the real issues between the parties being the amount claimed and calculation of interest – will not contribute towards the adjudication of the genuine dispute between the parties.

ORDER

1 The application to amend its particulars of claim in accordance with Annexure X to its notice of intention to amend is dismissed with costs, which costs shall include costs of two counsel (where so employed) on Scale B.

2 The plaintiff shall pay the wasted costs in respect of the second and third notices of intention to amend, respectively dated 22 August 2024 and 4 March 2024.

JUDGMENT

Van Rhyn J

[1] This is an interlocutory application by the plaintiff to amend its particulars of claim in accordance with annexure X appended to its notice of intention to amend dated 22 April 2025 and for an order that the defendants, jointly and severally, the one to pay the other to be absolved pay the costs of the application, if opposed. This application follows upon an objection filed on 8 May 2025 by the defendants against such contemplated amendments.

[2] On 24 April 2023 the plaintiff, Free State Wheels (Pty) Ltd, instituted action against the defendants which became defended. On 8 June 2023 the plaintiff served and filed its first notice of intention to amend its particulars of claim (the first notice). The defendants objected to the first notice on various grounds. An application for leave to amend followed whereupon Van Zyl J granted the plaintiff leave to amend its particulars of claim on 14 March 2024. The plaintiff was ordered to pay the costs of the application. The amendment was effected by the plaintiff on 29 April 2024.

[3] The defendants served and filed their plea together with a first claim in reconvention, an alternative claim in reconvention and a second claim in reconvention whereafter the plaintiff, on 22 August 2024, filed its replication and plea

to the claims in reconvention. Thereafter, the plaintiff delivered a second notice of intention to amend its particulars of claim (the second notice), to which the defendants objected; the plaintiff did not bring an application for leave to amend. On 4 March 2025, almost seven months later, the plaintiff served and filed its third notice of intention to amend (the third notice). The defendants objected to the third notice on 18 March 2025.

[4] Again, the plaintiff did not launch an application for leave to amend within the prescribed period. On 22 April 2025, the plaintiff served a fourth notice of intention to amend (the fourth notice) to which the defendants objected on 6 June 2025. The fourth notice forms the subject of this judgment. The grounds upon which the proposed amendment is objected to as per the notice of objection in terms of rule 28(3) can concisely be summarised as follows:

(a) the plaintiff's proposed amendment was delayed which results in trial-related prejudice to the defendants;

(b) the plaintiff's proposed amendment has the effect of withdrawing admissions previously made; and

(c) the plaintiff's proposed amendment renders the plaintiff's particulars of claim vague and embarrassing, alternatively, lacking the necessary averments to sustain a cause of action.

[5] The plaintiff contends that it has fully dealt with the grounds of objection as formulated in the notice in terms of rule 28(3) in its founding affidavit. On behalf of the plaintiff, it is argued that the defendants raised new objections in their answering affidavit and/or amplified their grounds of objection and contends that the defendants are not entitled to supplement their grounds of objections to the amendments in such a way. In the amended particulars of claim, and as elaborated upon in the founding affidavit deposed to by Robbert David Wiggett (Mr Wiggett), the plaintiff avers that it was the owner of approximately 295 motor vehicles and conducted, since 2008, a business in terms whereof the said vehicles were leased to third parties in lieu of payment of the monthly rentals as per the terms of the respective lease agreements.

[6] During September 2019, the third defendant, a chartered accountant, a shareholder and director of a number of companies, approached Mr Wiggett with a proposal that the third defendant would raise funding for the expansion of the vehicle rental fleet of the plaintiff. It was agreed that a separate entity, eventually the first defendant, would be used to implement the proposal, and that the plaintiff would sell the rights and obligations of a certain portion of its rental fleet as well as the relevant vehicles to such separate company as a going concern. On 27 July 2020, the plaintiff and the first defendant concluded a written sale agreement. Mr. Wiggett is the sole director and sole shareholder of the plaintiff. He was authorized by resolutions from both the plaintiff and the first defendant, and consequently represented both parties. In terms of the sale agreement, the plaintiff sold to the first defendant its rental fleet consisting of the vehicles set out in Schedule 1 together with accompanying rental contracts, as an enterprise and going concern.

[7] The purchase price was determined at R46 821 270, which was payable as follows:

(a) a deposit of R15 000 000 in cash upon signing of the agreement and the balance, in the amount of R31 821 270 in monthly instalments of R688 992.40 over a period of 54 months, payable on or before the first day of each month commencing on the first day of the month following signature of the agreement;

(b) interest calculated at a rate of 7% per year linked to the prima rate from time to time but not less than 6%, should the rate vary in subsequent years, per annum.

[8] Delivery of the vehicles would be made within a reasonable time whereafter the risk pertaining to each individual vehicle would pass to the first defendant. Should any party breach the agreement, the innocent party may demand specific performance or cancel the agreement. On 7 August 2020, the plaintiff and the first defendant concluded a written addendum to the initial sale agreement (appended as annexure B) and on 28 October 2020, the said parties concluded a second written addendum (appended as annexure C) in terms whereof the sale price was reduced

to R45 622 300 and would be payable as agreed. Furthermore, the plaintiff, by signing the addendum, irrevocably ceded, delegated, assigned and transferred all of its rights titles and obligations in and to the vehicles and the accompanying rental agreements to the first defendant. It is alleged that both parties performed in terms of the agreement as amended.

[9] On 20 December 2021, the plaintiff and the first defendant concluded a written repurchase of share agreement as per annexure D. Mr Wiggett represented the plaintiff and second-, alternatively the third defendant represented the first defendant. In terms of the repurchase of share agreement, the plaintiff sold to the first defendant its existing 1500 ordinary class A share capital. The remaining balance of the purchase price on the sale agreement, as amended, and as due on 30 November 2021, being the amount of R21 331 088, would be paid as set out in appendix C to the agreement. The fourth, fifth, and sixth defendants were parties to the agreement but only in so far as they were existing shareholders of the first defendant and had to consent to the transaction.

[10] On 23 August 2021, the second and third defendants bound themselves as sureties and co-principal debtors onto and in favour of the plaintiff for the proper and due fulfilment of the first defendant and pertaining to all the defendants' responsibilities and debts owed to the plaintiff. The deed of suretyship is annexed as annexure E. The plaintiff avers that the first defendant failed to effect payment of the monthly instalments due as purchase considerations since December 2022 in the total amount of R4 927 699.37 (as set out in appendix F to the amended particulars of claim). The plaintiff therefore claims against the first, second, and third defendants, jointly and severally, the one to pay the other to be absolved, payment of the amount of R4 927 699, as well as interest on this amount, calculated at a rate as set out in the sale agreement of 27 July 2020 from date of service of the summons until date of final payment, alternatively such interest as calculated at the applicable mora interest rate *a tempore morae,* from 11 January 2023 until final date of payment, and costs of suit.

[11] The current amended particulars of claim consists of ten pages whereas the proposed amended particulars of claim, if so allowed, would consist of 42 pages.

The plaintiff effectively requests that its existing amended particulars of claim be substituted by the further amended particulars of claim, annexed to its notice of intention to amend and marked as X. To avoid confusion, the proposed amended particulars of claim X will be referred to as draft X. Since the previous amendment of the particulars of claim, the plaintiff terminated the mandate of its erstwhile attorneys, resulting in the withdrawal of the erstwhile attorney of record (and counsel) and substitution by Symington De Kok as the present attorney of record since 3 April 2024. On 29 May 2024, Mr Van der Walt SC was briefed to advise the plaintiff regarding the continuation of the proceedings in the main action which eventually resulted in the second and third notices regarding proposed amendments as well as the fourth notice.

[12] The plaintiff contends that draft X records with sufficient particularity the material facts (the *facta probanda*), in chronological order, upon which the plaintiff relies in support of its contractual claims against the defendants; it is not necessary for the plaintiff to plead supporting evidence (the *facta probantia).* The defendants, in turn, can plead and reply to the material facts averred by the plaintiff. According to the plaintiff, the material facts pleaded in draft X deal with the real issues for determination between the parties, namely the terms and provisions of the relevant contracts and the issues whether the first, second and third defendants are liable to the plaintiff in terms of its respective contractual claims.

[13] Rule 28 provides that any party desiring to amend any pleading or document, other than a sworn statement, filed in connection with any proceedings, must give notice to all other parties to the proceedings of the intention to amend and furnish particulars of the amendment. Where there is an objection to the amendment, the notice of objection must clearly and concisely state the grounds upon which the objection is founded. Rule 28(10) 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.'

[14] It is trite law that a court hearing an application to permit an amendment has a wide judicial discretion. This is echoed in the wording of rule 28(10).[1] When exercising such discretion whether to permit an amendment, the court is required to follow the well-established approach set out in *Moolman v Estate Moolman*[2] (*Moolman*) where it was held as follows:

'[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 is sought to amend was filed.'

[15] The approach in *Moolman* was endorsed in later decisions where it was held that an amendment would not be allowed in circumstances which would cause the other party such prejudice as could not be cured by an order of costs and, where appropriate, a postponement. The power of the courts to allow even material amendments is therefore limited only by considerations of prejudice or injustice to the opponent in civil proceedings. In *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another*[3] it was held that the aim should be to do justice between the parties by deciding the real issues between them.

[16] The applicable principles were summarised in *Commercial Union Assurance Co Ltd v Waymark NO*[4] to be the following:

'(a) The Court has a discretion whether to grant or refuse an amendment;
(b) An amendment cannot be granted for the mere asking; some explanation must be afforded therefore.
(c) The applicant must show that *prima facie* the amendment "has something deserving of consideration, a triable issue".

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[1] *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 694G-H.
[2] *Moolman v Estate Moolman* 1927 CPD 27 at 29.
[3] *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D).
[4] *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk).

(d) The modern tendency lies in favour of an amendment if such "facilitates the proper ventilation of the dispute between the parties".

(e) The party seeking the amendment must not be *mala fide*;

(f) It must not "cause an injustice to the other side which cannot be compensated by costs".

(g) The amendment should not be refused simply to punish the applicant for neglect.

(h) A mere loss of time is no reason, in itself, to refuse the application.

(i) If the amendment is not sought timely, some reason must be given for the delay.'[5]

[17] The first objection raised by the defendants is that the proposed amendment was delayed which results in trial-related prejudice to the defendants. It is contended that when an amendment is not sought timeously, some explanation must be given for the delay and the party applying must not be mala fide. The defendants contend that some of the defendant's main witnesses, particularly Mr William Smit, have already left the employment of the defendants and might be untraceable by the time the matter is heard by the court.

[18] Trial-related prejudice refers to how a legal case is negatively impacted by a trial delay or other procedural issue, potentially harming a litigant's right to a fair trial. Examples include a prolonged wait for a trial to commence or numerous postponements during the proceedings which delay the finalisation of the matter. These delays can cause prejudice through factors like loss of memory of potential witnesses regarding the relevant events and death or the unavailability of witnesses. Section 34 of the Constitution guarantees a litigant's right of access to court for purposes of resolving a dispute.[6] This right is an embodiment of a common law principle that a person has a right to a proper and fair hearing, which has, at its core, the right of a litigant to present his or her version of the case before a court of law.

[19] I am not convinced that the fact that Mr William Smit is no longer in the employment of the defendants can be relied upon as an objection against the implementation of the proposed amendments. At this stage, there is no indication that Mr William Smit will not be available for the trial. The mere fact that he is no

[5] Ibid at 77F-I.

[6] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2017] ZACC 15; 2017 (5) SA 9 (CC) paras 61-64.

longer in the employment of the defendants does not mean that he will not be able to testify during the eventual proceedings. I am furthermore not convinced that the delay in the finalisation of this matter can be attributed entirely to the conduct or the failure to take certain steps by the plaintiff only. Summons was issued on 24 April 2023. Since then, the process which followed included an exception by the first to sixth defendants dated 15 May 2023, a notice of intention to amend by the plaintiff dated 7 June 2023 and the defendants' objection in terms of rule 28(3) dated 23 June 2023. The application to amend was heard as an opposed application on 14 September 2023 and judgment was reserved. Similarly, the current application to amend, also an opposed application was heard and judgment was reserved. These delays in the finalisation of and delivery of the judgments take place so that every litigant's rights to a fair trial may be realised.

[20] The plaintiff provided a reasonable and acceptable explanation for the delay which occurred since the withdrawal of the previous attorney who acted on behalf of the plaintiff, which also included the termination of the mandate of counsel previously involved on behalf of the plaintiff. As a direct consequence of such withdrawal, the attorney on record for the plaintiff as well as Mr van der Walt SC had to consult with the plaintiff and possible witnesses in an endeavour to become acquainted with the facts and history of the matter which encompassed the numerous dealings and contracts concluded between the parties. Mr van der Walt SC advised that it was necessary to further amend the plaintiff's particulars of claim and obviously received instructions to proceed with the necessary steps to bring about the proposed amendments.

[21] Even though the defendants waited for approximately a year before the fourth notice to amend saw the light, it has to be taken into consideration that objections were raised to each and every notice to amend by the defendants, which of course, were filed in accordance with the rules of civil procedure. As explained by Mr van der Walt SC, these objections were considered and, to a certain extent, found to be meritorious which steered the plaintiff back to the drawing board. The process inevitably caused delays in the speedy finalisation of the matter. However, a delay as such does not prevent the granting of an amendment. An amendment based upon a delay will only be refused if the applicant deliberately refrained, until a late stage of

the proceedings, to apply for an amendment with the purpose of catching his opponent by surprise or to obtain a tactical advantage or to avoid a special order as to costs.

[22] Where a delay in bringing an application for leave to amend causes prejudice to the other party which cannot be cured by an order of costs, the amendment will generally be refused. In the matter at hand the parties have not yet embarked upon the pre-trial stage and no trial date has been set. The plaintiff furthermore applies for an order to rectifying the annexures (schedules) attached to the sale agreement in order to identify the relevant annexures, namely the annexure (schedule) that contains the list of vehicles (Schedule 1) and the annexure that records the 54 instalments in respect of the payment of the capital amount of R31 821 270 (Schedule 2). The plaintiff also seeks an order rectifying the written first addendum, annexure B, to the amended particulars of claim through the deletion of the date '31 July 2020' where it appears in the preamble, and by substitution thereof with the date '27 July 2020'. The date '30 November 2021', where it appears in clause 5.1.5 of the share repurchase agreement, is furthermore to be substituted with the date '1 November 2021'. No objection to the rectification of these dates and the conditional claim for rectification in respect of the schedules has been raised by the defendants.

[23] The purpose of rectification is to have the written contract conform to the common intention of the parties. Rectification is necessary before a court may entertain evidence running counter to the written words unless all parties affected by the error agree extrajudicially to remedy the situation. Notwithstanding the view of the defendants not to oppose the rectification of these issues, I do, however, agree with the contention that a significant period of time was spent on deciding upon the contents of the eventual draft X – approximately a year – and that this aspect will have to be considered when deciding upon a proper award as to costs.

[24] The defendants also objected to the plaintiff's first notice to amend its particulars of claim in respect of the claim for payment of interest, which was dismissed by Van Zyl J on the basis that it was evident that the plaintiff pleaded its case in respect of interest in para 9.2.3 of the particulars of claim (as amended) on the basis that the pleaded interest rate is what the parties agreed upon in terms of

the sale agreement dated 27 July 2020, either expressly, alternatively impliedly, and in the further alternative, tacitly. In para 9.2.3 of the amended particulars of claim the plaintiffs claimed interest on the following basis: 'Interest calculated at a rate of 7% per year linked to the prime rate from time to time but not less than 6%, should the rate vary in subsequent years, per annum'.

[25] In draft X however, interest is claimed by the plaintiff in respect of the main claim for payment of the amount of R2 400 000 as follows: '2. Payment of interest on the amount of R2 400 000 calculated at the rate of 7% per year from 1 December 2022 until date of payment; alternatively, interest in terms of the provisions of the Prescribed Rate of Interest Act, No 55 of 1975, *a tempore morae* until date of payment.' In respect of the amount of R2 478 109 claim is as follows: '4. Payment of interest on the amount of R2 478 109 calculated at the rate of 7% per year from 1 January 2023 until date of payment; alternatively, interest in terms of the provisions of the Prescribed Rate of Interest Act, No 55 of 1975, *a tempore morae* until date of payment.'

[26] Similar amendments are prayed for in respect of payment of interests pertaining to the alternative claim for rectification of the share repurchase agreement and payment of the amount of R2 400 000 and payment of the amount of R2 478 109 as set out above. The objection is that these allegations amount to a withdrawal of an earlier admission, or is in direct contradiction to the plaintiff's prior plea to the defendant's second claim in contravention, in which the plaintiff pleaded that the agreed interest rate was 7% linked to prime, but not less than 6% per annum. The defendants contend that the proposed particulars of claim fails to set out any factual or legal basis for now claiming interest at a different rate, or for reliance on the Prescribed Rate of Interest Act 55 of 1975. The respondents contend that there is no sworn explanation for this fundamental change in the applicants case and that they are significantly prejudiced by the shifting and uncertain nature of the claim they have to meet, having regard to the fact that the 'reformulation' of the plaintiff's claim happens more than a year after pleadings closed and after the respondents filed their claims in reconvention.

[27] The particulars of claim must contain a prayer for payment of interest if interest is sought and must set out the grounds upon which interest is claimed. The claims in terms of the original particulars of claim, the particulars of claim as amended in terms of the order granted by Van Zyl J on 14 March 2024, the proposed amendments being the second and third notices which were abandoned, as well as the present proposed amendments as per draft X, are all based upon the same contracts, namely the sale agreement, the addenda thereto, the deed of suretyship and the share repurchase agreement. These contracts were concluded in the time period from 27 July 2020 when the sale agreement was concluded up until 20 December 2021, when the share repurchase agreement was concluded.

[28] The contention on behalf of the defendants that the proposed amendment pertaining to the claim for payment of interest at the rate of 7%, and no longer 7% but not less than 6%, amounts to a withdrawal of an admission, is addressed by the plaintiff on the basis that no admission is being withdrawn. The rights and obligations of the respective parties have to be determined with reference to the terms of the relevant contracts. Even though the rate of interest now inserted in the draft X is 7%, whereas the interest claimed previously was at the rate of 7% per year linked to the prime rate from time to time but not less than 6%, should the rate vary in subsequent years, per annum, and in the alternative, a claim based on the provisions of the Prescribed Rate of Interest Act 55 of 1975, I am in agreement with the plaintiff that such an amendment does not equate to a withdrawal of a previous admission.

[29] A rate of payment of interest on a judgment debt, including unliquidated debts as determined by a court, and the payment thereof, are regulated by the Prescribed Rate of Interest Act. Apart from interest *a tempore morae* and the special cases where mora may be implied (for example, actions concerning money improperly taken) there is no liability to pay interest upon any debt unless there was an agreement or a course of dealing to that effect. This must, therefore, be alleged by a plaintiff. An amendment to a pleading involving the withdrawal of an admission stands in a rather different position from other amendments and is more difficult to achieve because it involves a change of front, which requires a full explanation to

convince the court of the bona fides of the party seeking the amendment. Also, it is more likely to prejudice the other party, who has been led by the admission to believe that the fact in question need not be proven and who may, for that reason, have omitted to gather the necessary evidence.

[30] An admission can be described as the action of admitting something as proper, valid or true.[7] The consequences of a formal admission are twofold: firstly, it obviates the need for proof of the admitted fact and, secondly, it prohibits parties from disproving such a fact. In *Botha v Van Niekerk*[8] the court held that an admission is an unequivocal agreement by one party with the statement of fact made by another party. An averment in the particulars of claim regarding the rate of interest applicable to the amount claimed by the plaintiff can hardly be described as an admission made which is now being withdrawn by the plaintiff in draft X. An allegation in the particulars of claim does not constitute a formal admission of facts.[9] At the trial, the plaintiff will still have to prove the facts as alleged in the particulars of claim pertaining to the rate at which interest is claimed and whether such claim is in accordance with the contract concluded between the relevant parties. The defendants' contention that the allegation pertaining to the rate of interest allegedly applicable to the amount claimed constitutes an admission, is misplaced.

[31] It is contended that the plaintiff fails to plead with sufficient clarity what instalments were due, when they were due, what interest is claimed or on what basis the interest is calculated. The objection by the defendants essentially turns on the reliance placed on annexure C/C1 to the share repurchase agreement in that the content thereof differs from annexure A to the deed of suretyship, more specifically that the dates do not correspond and the interest rate is not the same. The instalment amounts have not been included in annexure C1, whereas on annexure A, such amounts, all being R599 457 from instalment number 18 up to and including instalment number 54, appear. It is therefore argued that the plaintiff has failed to set out how the amounts that the defendants must pay were calculated and these contradictions render the draft X vague and unintelligible.

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[7] *The New Shorter Oxford English Dictionary* (1993) vol I at 28.
[8] *Botha v Van Niekerk* 1947 (1) SA 699 at 703.
[9] *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (CPD) at 452 F-H.

[32] The contention on behalf of the plaintiff is that there was no suspension of the obligation upon the first defendant to pay the remaining balance of the purchase price in terms of the sale agreement as at 1 November 2021 in accordance with the provisions of annexure C to the share repurchase agreement and, in the alternative, such suspensive conditions were, in any event, duly fulfilled. The plaintiff contends that the first defendant has failed and/or refused to effect payment of the remaining balance of the purchase price payable by the first defendant to the plaintiff, as at 1 November 2021, in terms of the sale agreement, as amended and/or supplemented by clause 5.1.5 of the share repurchase agreement, as it has to be rectified with the remainder of the provisions of clause 5 of the share repurchase agreement, to be rectified as set out and in accordance with the provisions of annexure C to the share repurchase agreement.

[33] The plaintiff has pleaded that the following payments were made to it:

(a) 3/11/2021	R 599 457.
(b) 1/12/2021	R599 457.
(c) 3/01/2022	R599 457.
(d) 1/02/2022	R1 000 000.
(e) 2/03/2022	R1 100 000.
(f) 1/04/2022	R1 200 000.
(g) 3/05/2022	R1 350 000.
(h) 1/6/2022	R1 650 000.
(i) 4/7/2022	R1 650 000.
(j) 5/08/2022	R1 800 000.
(k) 9/09/2022	R1 950 000.
(l) 11/10/2022	R2 100 000.
(m) 7/11/2022	R2 250 000.
Total	R 17 698 371.

[34] In the plea filed by the first defendants dated 29 April 2024 it is recorded that the different contracts are admitted in so far as the written terms of the agreements conform to the terms as pleaded. However, the content of annexure C is illegible and the plaintiff is put to the proof of the contents of annexure C. It is denied that annexure C recorded the manner of repayment of the capital amount outstanding in monthly instalments as alleged by the plaintiff and the plaintiff is put to the proof thereof. It is denied by the first defendant that the plaintiff is entitled, in terms of the deed of suretyship, to interest claimed and prayed for by the plaintiff. It is furthermore pleaded by the first defendant that annexure A to the deed of suretyship is illegible, and the plaintiff is put to the proof of the contents of annexure A. Evidently, the payment of the amount of interest claimed by the plaintiff has been a bone of contention since summons has been issued.

[35] In the judgment of Van Zyl J, delivered on 14 September 2023, the objection by the defendants pertaining to the alleged illegible documents that were annexed to the plaintiff's proposed amendment of the particulars of claim was dealt with, with reference to case law and the provisions of rule 18(6). The plaintiff has already provided an explanation as to why more clearly legible annexures of the relevant written contracts and addendums, relied upon by the plaintiff, have not been appended to the particulars of claim.

[36] Since the notice by the defendants in terms of rule 23(1) during May 2023 in this regard, the plaintiff has endeavoured to provide more legible transcripts of the agreements relied upon. Reprinted copies of the schedules (Schedule 1 and Schedule 2) that are annexed to the sale agreement are annexed to draft X as, respectively A1 and A2. In the alternative, and in the event that it is not clear that the one schedule contains the list of vehicles and the latter schedule records the 54 instalments in respect of the payments to be made in respect of the sale agreement, the plaintiff claims rectification of the sale agreement and the annexures thereto. There is no objection to the recertification of the sale agreement as set out in paragraph 13 of draft X.

[37] Van Zyl J dismissed the opposition to the initial amendment in respect of the illegible annexures to the particulars of claim on the basis that an explanation why more clearly legible annexures have not been annexed was provided by the plaintiff. I therefore do not deem it necessary to deal with this issue again.

[38] The objection by the defendants that the plaintiff's proposed amendment as per draft X renders the plaintiff's particulars of claim vague and embarrassing, alternatively lacking the necessary averments to sustain a cause of action, *inter alia,* relates to the instalments which, according to the plaintiff were unpaid. In terms of clause 1 of the deed of suretyship, the obligations secured are limited to the debtor's obligations arising from the creditor's shareholder's loan of R22 739 700 as of 1 August 2021, or any novation thereof, as well as costs. Clause 2 of the deed of suretyship provides that repayment of the loan will occur as per annexure A and that the sureties become liable only for such instalments as the debtor fails to pay in terms of annexure A. The defendants contend that annexure A was only introduced in the third notice to amend, some two years after the action was instituted, and said annexure differs from annexure C and its reprinted version, annexure C1 to the share repurchase agreement. The contention is that the repayment dates and the amounts in these annexures do not correspond.

[39] In addition, the plaintiff, now in the fourth notice, seeks to rely on an averment that the deed of suretyship was amended or supplemented by clause 5.3 of the share repurchase agreement and further that the first defendant agreed to amend or supplement the sale agreement to provide for repayment in terms of annexure C. The argument on behalf of the defendants is that the annexures, being C and C1, do not reflect the instalments and the defendants cannot ascertain which instalments are alleged to have been unpaid, on which dates they became due, what amounts are claimed as interest or how such interest has been calculated.

[40] Rule 18(4) of the Uniform Rules of Court provide as follows: 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto'. In *Trope v*

South African Reserve Bank,[10] the Supreme Court of Appeal dealt with an exception*,* it was held that in order to determine whether a pleading is vague and embarrassing the pleading must be read as a whole.[11] An exception to a pleading on the ground that the pleading was vague and embarrassing involves a two-fold consideration. The first issue is whether the pleading lacks particularity to the extent that it is vague and the second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. There are authorities that support the proposition that an amendment should be refused if it is clear that the amended pleading will (not may) be excipiable.[12]

[41] The starting point is that the court must accept as correct the allegations contained in the particulars of claim, incorporating the proposed amendment, and determine whether those allegations are capable of supporting a cause of action in respect of the plaintiff's claim.[13] The plaintiff relies on the sale agreement, addenda thereto, the deed of surety and the share repurchase agreement in support of its claim for the first defendant's indebtedness to the plaintiff on the basis that the clauses identified in draft X are not rectified and also in the event that the clauses as identified in draft X are rectified. It is alleged by the plaintiff that the payments, as set out and as contained in draft X, were made to the plaintiff and that the first defendant has failed and/or refused to effect payment of the remaining balance of the purchase price with reference to annexure C. In respect of the claim for payment against the first, second and third defendants' indebtedness to the plaintiff, reliance is thus placed upon the content of annexure C appended to draft X.

[42] From annexure A the following can be ascertained: the sequence of instalments, from the first instalment in September 2020 to the 54th instalment in February 2025, being 54 months, the amount of each such instalment, the opening capital and the interest as calculated and reflected. The number of instalments reflected on annexure C, appear to be 28 whereas the number 13 appears twice in year two, which means 29 instalments are recorded. The amount of each of the

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[10] *Trope v South African Reserve Bank 1993 (3) SA 264 (A);* See also *Trope v South African Reserve Bank* 1992 (3) SA 208 (T).
[11] Ibid at 268.
[12] *Krische v Road Accident Fund* 2004 (4) SA 358 (W) at 363A-D and the authorities referred therein.
[13] *Stewart and Another v Botha and Another* 2009(6) SA 310 (SCA) para 4.

instalments appears for the first 16 months, however having regard to the fact that instalment 13 appears twice, it means that only the instalments for the first 17 months appear on annexures C and C1. The amount due in respect of any of the subsequent instalments has not been calculated and cannot be ascertained from the contents of annexure C.

[43] The payments which have been made, according to the plaintiff, since 3 November 2021, have not been incorporated in annexure C. The instalments paid since 1 September 2020 up to and including January 2022 have been incorporated in annexure C, which is obviously a computer-generated calculation. The plaintiff is required to plead the facts pertaining to the instalments due: which instalments were made, when such instalments were made and how the interest in respect of the amount due and owing, as demanded by the plaintiff, is calculated to enable the defendants to determine the quantum of the plaintiff's claim. Only then will the defendants be in the position to properly assess the quantum of the plaintiff's claim.

[44] Having regard to the amended particulars of claim, draft X, as well as the contents of the plea together the further pleadings already filed in this regard, it seems, which, at this point is merely a *prima facie* view only, that the main issues between the parties are the calculation of the plaintiff's claim and the interest upon such an amount, and as regards to the interest, the rate of interest. In *Benjamin v Sobac South African Building and Construction (Pty) Ltd*[14] it was held that where a proposed amendment will not contribute to the real issues between the parties being settled by the court, the amendment should not be granted as granting such amendment will simply prolong and complicate the proceedings for all concerned, and will not contribute towards the adjudication of the genuine dispute between the parties.

[45] The argument that the defendants will be able to do a recalculation of the amount due to the plaintiff based upon the averments made in draft X and as supported by the annexures, is, in my view, misplaced. The plaintiff failed to plead with particularity how the amounts claimed are made up and calculated with the

[14] *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958B.

result that the defendants are not placed in a position to reasonably assess the quantum of the plaintiff's claim. In the result, I agree with the argument raised on behalf of the defendants that the instalments which have allegedly not been made, the dates when they became due, what the amounts of the instalments amounted to, what amounts are claimed as interest or how such interest has been calculated are indeed deficient, rendering the proposed amendment vague and prejudicial to the defendants.

[46] During argument, Mr Van der Walt SC conceded that the plaintiff ought to pay the defendants' wasted costs in respect of the second and third notices for amendment in accordance with the provisions of rule 28(9).

[47] It is apparent that evidence will be required for a proper determination of the issues upon which the parties are not in agreement. Those issues are more appropriately to be determined by the trial court on evidence before it. The defendants will be able to plea to the majority of the plaintiff's detailed allegations in the proposed amended particulars of claim, draft X. However as to the calculation of the specific amounts claimed by the plaintiff as amplified by the amounts and dates reflected in the annexures, more specifically annexure A and C/C1, I am in agreement with the defendants that those allegations and calculations are not formulated in a way that allows the defendants to ascertain clearly what the case against them entails and therefore does not enable the defendants to plead on it. In this regard, I am mindful that the primary object of allowing an amendment is for the proper ventilation of the dispute between the parties in order to determine the real issues between them, so that justice may be done.[15]

[48] Although the majority of objections raised by the defendants to the proposed amendment are unsuccessful, the proposed amendment cannot succeed merely due to the fact that it is contained in one document being draft X. There is no reason that costs should not follow the event.

Order

[49] In the result, I make the following order:

[15] *YB v SB* [2015] ZAWCHC 109; 2016 (1) SA 47 (WCC) para 11.

1. The application to amend its particulars of claim in accordance with Annexure X to its notice of intention to amend is dismissed with costs, which costs shall include costs of two counsel (where so employed) on Scale B.

2. The plaintiff shall pay the wasted costs in respect of the second and third notices of intention to amend, respectively dated 22 August 2024 and 4 March 2025

I VAN RHYN
JUDGE OF THE HIGH COURT

Appearances

For the applicant:	D J van der Walt SC
Instructed by:	Symington De Kok Attorneys Bloemfontein
For the defendants:	Y Coertzen and B C Bester
Instructed by:	A P Pretorius Attorneys Bloemfontein