



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

Reportable/Not Reportable

Case no: 9983/2023

In the matter between:

USA DISTILLERS (PTY) LTD

Plaintiff/Respondent

and

ASPEN INTERNATIONAL (PTY) LTD

Defendant/Applicant

Neutral citation: *Aspen International (Pty) Ltd v USA Distillers (Pty) Ltd.*

Coram: MANGCU-LOCKWOOD J

Heard: 18 March 2026

Delivered: 26 March 2026

ORDER

1. The application to amend is refused, and the objection is upheld.

2. The defendant is to pay the costs of this application on an attorney and own client scale, including costs of counsel.

JUDGMENT

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an opposed application for amendment of the defendant's plea. The plaintiff instituted action against the defendant for damages arising from contamination of International Standard Tank Containers ('ISO tanks') containing ethanol, which were refused entry in Keelung, Taiwan. The plaintiff's claim is based on a breach of agreement between it and the defendant, the terms of which include the supply of the ISO tank containers for export of the ethanol to a client of the plaintiff in Taiwan. The defendant denies concluding the agreement in its personal capacity, pleading that it acted as a clearing and forwarding agent on behalf of a third party.

[2] After pleading the terms of the alleged agreement and compliance therewith, the plaintiff pleaded the breach of agreement as follows at paragraphs 4 to 17 of the particulars of claim:

- "12. However, on arrival at the Port of Keelung, and on or about 21 November 2021, two of the seven ISO tank containers were found by the Taiwanese authorities to contain contaminated ethanol.

13. The Taiwanese authorities accordingly refused to allow the seven ISO tank containers to be imported into Taiwan.
14. The ethanol in the two ISO tank containers was contaminated because the supplied ISO tank containers were not properly cleaned prior to supply to the Plaintiff, and/or were not free from residue from materials previously stored in the tank containers, and/or did not meet the industry standards for cleanliness, safety, and quality preservation.
15. The defendant accordingly breached the agreement.
16. As a result of defendant's breach of the agreement:
 - 16.1 The seven ISO tank containers were rejected for import into Taiwan.
 - 16.2 The plaintiff could not fulfil its obligations in terms of its contract with its client in Taiwan.
 - 16.3 In order to mitigate its damages, the plaintiff re-exported the ethanol to another client as a lower quality product at a substantially lower price.
 - 16.4 The plaintiff had to pay additional shipment charges to transport the ethanol to its alternative client in Rotterdam in the Netherlands during August 2022.
 - 16.5 The plaintiff was liable for storage and demurrage charges for the storage of the ISO tank containers at the Port of Keelung, Taiwan for an extended period, from arrival of the tank containers and up until 5 August 2022.
 - 16.6 The plaintiff had to incur additional costs to test samples of the ethanol.
17. The plaintiff suffered damages in the amount of US\$ 97 860. 86. Particulars as to how these damages are calculated are as follows:
 - 17.1 US\$ 47 567.33, being the difference between the forfeited selling price agreed upon between plaintiff and its customer in Taiwan and

the selling price plaintiff received from the alternative buyer in the Netherlands, plus freight charges from Taiwan to the Netherlands; plus

17.2 US\$ 50 293.53, being the total storage and demurrage charges incurred by plaintiff in the port of Keelung, Taiwan, laboratory analysis of ethanol samples, and costs associated with the transportation of samples”.

[3] In response to all these allegations, the defendant pleaded as follows in paragraph 3.1 of its plea:

“The defendant denies that it entered into a contract with the plaintiff as pleaded in 2.4 above and plaintiff is put to the proof thereof”.

[4] Paragraph 2.4 referred to in this paragraph states as follows:

“The defendant attended the meeting merely as a clearing and forwarding agent on instructions from Newport Europe BV”.

[5] Thus, there was no response in the plea as regards the alleged breach of contract within the contemplation of Uniform Rule 22 which requires a defendant to admit, deny, confess and avoid the allegations in the particulars of claim or to state what is not admitted. In the same vein, there was no response as regards the alleged refusal of entry by the Taiwanese authorities. The result is that, as stated in Uniform Rule 22(3), if a fact is not stated to be admitted or denied, it is taken to be admitted.

[6] At a pre-trial meeting between the parties’ legal representatives held on 13 July 2024 the parties agreed that the only issue to be adjudicated by the court was whether the defendant was a party to the contract pleaded in the particulars of claim. Further, that if the court were to find that the defendant was a party to the

agreement, then the plaintiff was entitled to judgment, and that if the court found that the defendant was not a party to the contract then the claim should be dismissed. A transcript of that meeting confirms the agreement, and also that the attorney representing the defendant confirmed that ‘everything else’, apart from whether the defendant was a party to the contract, was common cause.

[7] On 27 September 2024 the defendant delivered a notice of intention to amend its plea in which it: pleads that it has no knowledge of whether the containers were filled with extra neutral ethanol; specifically denies the contents of paragraphs 12 to 14 of the particulars of claim; denies the breach of agreement; and denies the allegations of incurred damages by the plaintiff.

[8] On 30 September 2024 the plaintiff noted an objection, stating that the effect of the amendment would be to widen the ambit of the defendant’s case, contrary to the agreements reached at the pre-trial meeting, and would amount to withdrawal of admissions made, without explanation. The defendant took no further steps thereafter, and as a result, the intention to amend lapsed. It was a year later, on 2 October 2025 that it delivered another notice of intention to amend, in terms identical to the previous notice, and it is this latter application that is the subject of this application.

B. THE RELEVANT LAW

[9] Before discussing the parties’ contentions, it is well to set out the applicable law. A decision regarding whether to grant or refuse an application to amend a

pleading rests within the discretion of the court.¹ The Constitutional Court² and Supreme Court of Appeal³ (SCA) have confirmed the practical rule that emerges from case law, that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed. The question in each case, said the Constitutional Court⁴, is what do the interests of justice demand.

[10] The modern tendency of the courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.⁵ The power of the court to allow even material amendments is therefore limited only by considerations of prejudice or injustice to the other side.⁶

[11] In *Amod*⁷, the court summarised the position pertaining to withdrawal of admissions already made, as follows:

'I consider that the true position in the case of the withdrawal of an admission is as follows. The Court has a discretion but will require a reasonable explanation both of the

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

² *Affordable Medicines Trust and Others v Minister of Health and Another* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005) para 9, referring to *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) at 76D -76I and *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.

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

⁴ *Affordable Medicines Trust* at para [9].

⁵ *Media 24 (Pty) Ltd v Nhleko and Another* (109/22) [2023] ZASCA 77 (29 May 2023) para 16.

⁶ *Ibid.*

⁷ *Amod v South African Mutual Fire And General Insurance Co Ltd* 1971 (2) SA 611 (N).

*circumstances under which the admission was made and of the reasons why it is sought to withdraw it. In addition, the Court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him then the application to amend will be refused. It should, however, be noted that the fact that the amendment will cause the respondent to lose his case is not of itself "prejudice" or "injustice" in the sense discussed above. (Zarug v. Parvathie, supra at p. 884; South British Insurance Co., Ltd. v. Glisson, supra at p. 294; cf. Stolz v. Pretoria North Town Council, 1953 (3) SA 884 (T)).*⁸

[12] It has been held that an amendment to cure a tactical advantage which the other party may enjoy is not the type of prejudice which is contemplated by prejudice that cannot be cured by an award of costs or a postponement.⁹

[13] The Court in *Amod*¹⁰ also referred to *Rishton*¹¹ where it was held that, in judging whether it ought or ought not to grant an amendment it is very necessary for the court to consider whether the admission as contained in the pleading is exactly as the client would have wished the admission to have been made before the Court.¹² The Court in *Whittaker*¹³ explained as follows:

'This Court has the greatest latitude in allowing amendments and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon

⁸ 614H-615A.

⁹ *Ergo Mining (Pty) Limited v Ekurhuleni Metropolitan Municipality and Others* (2014/45277) [2020] ZAGPJHC 134; [2020] 3 All SA 445 (GJ) (8 June 2020) para 8.

¹⁰ *Amod v South African Mutual Fire And General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614C-D.

¹¹ *Rishton v. Rishton*, 1912 T.P.D. 718 at p720.

¹² See also reference to *Northern Mounted Rifles v O'Callaghan*, 1909 T.S. 174 at p178.

¹³ *Whittaker v. Roos and Another*, 1911 T.P.D. 1092 at p. 1102. Discussed in *Amod* at 615B-D.

what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore the Court will not look to technicalities, but will see what the real position is between the parties.'

[14] The position is summarised as follows in *Erasmus*¹⁴, where it is noted that an amendment involving a withdrawal of an admission is not put on a basis different from any other amendment:

‘The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the *bona fides* thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence.’

The court will, therefore, in the exercise of its discretion, require an explanation of the circumstances under which the admission was made and the reasons for now seeking to withdraw it.’

C. THE APPLICATION

[15] The affidavit supporting the application for amendment is deposed by the attorney representing the defendant, Mr Lombard, and he admits to reaching the agreements at the pre-trial meeting. He explains that the agreements were made erroneously and that it was never his intention to concede that the defendant breached any obligations in terms of the agreement pleaded or that the ISO tanks were contaminated. He states that, since the defendant has explicitly stated that it was not a party to the ISO tank agreement it could not admit that the tanks were

¹⁴ *Superior Court Practice* at RS 28, 2025, D1 Rule 28-12.

refused entry by the Taiwanese authorities on account of contamination; or that the tanks were contaminated; or that the alleged contamination was the result of a breach of agreement by the defendant. He states that the proposed amendment is *bona fide* and does not prejudice the plaintiff but merely seeks to clarify the true issues in dispute between the parties. In addition, he states as follows:

“The [defendant] disputes that the ethanol that forms the basis of this claim was contaminated. In this regard, I am instructed that foreign authorities are known to miss state this position and [the defendant] suspects that [the plaintiff] is unable to prove the contamination. This aspect is bound to be a central question in the dispute as well as, if contamination is proven, the source thereof’.

[16] In the affidavit Mr Lombard states that he holds instructions to tender the plaintiff’s wasted costs occasioned by the amendment application, but not if it is opposed.

[17] The plaintiff filed an answering affidavit, which is deposed by the director of the plaintiff. First, the plaintiff complains that Mr Lombard has no personal knowledge of the factual basis on which the defendant seeks to deny allegations previously admitted. Then, it is pointed out that the defendant is seeking to withdraw admissions previously made, without setting out the special circumstances giving rise to the withdrawal. Further, the plaintiff alleges that the application is *mala fide* and constitutes an abuse of the court process.

[18] Starting with the last attack, the allegations of *mala fides* rely substantially on the delay in bringing the amendment application, and also the averment made in Mr Lombard’s affidavit that the purpose of the amendment is effectively to cause the plaintiff to prove all the elements of its claim which he says his client suspects

the plaintiff will be unable to prove, and especially the alleged contamination of the tanks. The plaintiff states that this shows that the retraction of the admission is not genuine but is being employed as a tactical strategy.

[19] On the basis of these averments the plaintiff states that the attempt to withdraw the admission is clearly for tactical reasons and that no basis is laid for it. Furthermore, it states that the withdrawal will prejudice it because the plaintiff would now need to source evidence of the contamination; that the laboratory is in Taiwan and is unlikely to have retained samples after this extended period.

[20] In reply, Mr Lombard denies that he lacks personal knowledge of the underlying facts, emphasising that he has personal knowledge of the facts that gave rise to the plea being filed as well as the circumstances under which the admissions made at the pre-trial meeting were made since it is he who attended it and made them. He also disputes the allegations of *mala fides*, emphasising that he made an error. Although he does not dispute the timeline set out by the plaintiff from the time that the action was launched, which shows a delay of some two years from close of pleadings to the bringing of this application, he emphasizes that between 30 September 2024 and 5 November 2024, he was awaiting delivery of the recording of the pre-trial meeting of 13 July 2024 which he had requested from the plaintiff's attorney.

[21] One of the annexures in the application is a letter from Mr Lombard dated 26 August 2024, just over a month after the pre-trial meeting in which he stated as follows in response to a draft of the pre-trial minute of 13 July 2024:

- “7. ... it appears to writer that the minute contains an error caused by a misunderstanding. The minute records that the sole issue between the parties is whether our client ... was a party to the agreement pleaded in paragraph 3 of the particulars of claim.
8. However, the dispute cannot be reduced to this simple question, but must also include the question of the terms of the agreement.
9. Your client’s case, as understood by us, is based on alleged deficiencies in the ISO tank containers utilised to ship its ethanol.
10. Our client’s case is that it merely acted as a clearing and forwarding agent between your client and Newport Europe BV, and that it did not accept liability for the standard or any possible defect in the ISO tanks.
11. Leaving aside the question of whether the ISO tanks were deficient as alleged by your client, it is likely that the trial will also turn on the terms of the agreement.
12. To the extent that our client’s case is unclear from the plea, we intend to deliver a notice to amend same”.

[22] Thus, within just over a month of the pre-trial meeting the defendant’s attorney notified the plaintiff’s attorneys of an intention to amend, and of an error which he says was caused by a misunderstanding. Whilst Mr Lombard may be criticised for making such an error as a legal representative, there is no basis to conclude it was *mala fide*. There is no such evidence.

[23] And the fact that he refers in his affidavit to a need by the plaintiff to prove its case is also not evidence of *mala fides* but an incident of the onus that usually falls upon a plaintiff when instituting action proceedings. It has been held, in any event, that an amendment to cure a tactical advantage which the other party may

enjoy is not the type of prejudice which is contemplated by prejudice that cannot be cured by an award of costs or a postponement.¹⁵

[24] Nor is there evidence that the delays incurred from the time that the plea was issued until the notice of intention to amend was delivered, constitute, in themselves, *mala fides*. There is no basis to conclude so, whether on the part of Mr Lombard or on the part of his client, although the plaintiff's frustration at the defendant's dilatoriness is understandable.

[25] The next issue for consideration is whether the withdrawal of the admission results in prejudice of such a nature as to preclude the defendant from effecting its amendment. The prejudice alleged by the plaintiff is that it will now be compelled to prove, years later, matters which had been treated as common cause, including contamination, the circumstances of the refusal of entry, causation, and quantum likely requiring evidence from Taiwan which may no longer be available. It states that that prejudice cannot be cured by a costs order.

[26] There is significant force to the argument. One important consideration when considering the alleged prejudice is that the plea that is sought to be amended was delivered in September 2023, and it has taken the defendant some two years to bring this application. By the time that the pre-trial meeting between the parties was held on 13 July 2024, a period of just under a year had elapsed in which there was no mention of an ensuing amendment. And the common cause facts between the parties were confirmed at the pre-trial meeting of 13 July 2024.

¹⁵ *Ergo Mining (Pty) Limited v Ekurhuleni Metropolitan Municipality and Others* (2014/45277) [2020] ZAGPJHC 134; [2020] 3 All SA 445 (GJ) (8 June 2020) para 8.

[27] It is in that combined historical context that the plaintiff's argument that the defendant should provide sufficient explanation for its about-turn is to be viewed. Even if Mr Lombard's explanation may suffice as regards the errors he made at the pre-trial meeting, there remains no explanation for the change of face from the position adopted in the plea. All that is stated in the founding affidavit in regard to the plea is that:

- “23. With the benefit of hindsight I concede that the aforesaid three aspects¹⁶ should have been disputed explicitly, but a failure to directly address the allegations pertaining thereto do not, I respectfully say, amount to a positive admission thereof.
24. This is so because a denial of these aspects is implicit in the defendants primary defence. Clearly the defendant could not breach an agreement to which it is not a party, nor does the defendant have direct knowledge of the alleged contamination.”

[28] Clearly, the averments made by Mr. Lombard at paragraph 23 fly in the face of the contents of Uniform Rule 22 to which I have already referred. There is no explanation in this application for why the identified three aspects were not addressed directly in the plea, whether by reference to an error or anything of the sort, especially given the length of time it took to bring the amendment. One imagines that by the time it was thought necessary to bring the application there would be a reason.

[29] It is also not enough, as contended by Mr. Lombard, that the defendant denies being a party to the agreement in the plea, otherwise this application would

¹⁶ The three aspects referred to are set out at paragraphs 22.1 – 22.3 of the founding affidavit as follows: (1) that the two tanks were refused entry by the Taiwanese authorities on account of contamination; (2) that the tanks were contaminated; and (3) that the alleged contamination was the result of a breach of the agreement by the defendant.

not have been necessary. It is relevant in this regard that the position adopted by the defendant in the plea is not that it has no knowledge of the circumstances alleged in the particulars of claim. Its position is that it acted as a clearing and forwarding agent on behalf of another, and it is on that basis that it denies having entered into a contract with the plaintiff.

[30] The defendant also does not deny the averments made in the particulars of claim that the ISO tank containers were supplied to the plaintiff. That much was repeated in his letter of 26 August 2024, where it is stated that the defendant “*merely acted as a clearing and forwarding agent between your client and Newport Europe BV, and that it did not accept liability for the standard or any possible defect in the ISO tanks*”. Since it also alleges that it attended the meeting at which the agreement was reached, one would have therefore expected it to specifically address the so-called three aspects relating to the alleged contamination and the denial of access to Taiwan, or to explain why the failure to address them is now being undertaken. It is in that regard that the plaintiff states that Mr Lombard's explanation is not adequate.

[31] It is one thing for him to admit to an error made in the pre-trial meeting. Given that the effect of undoing his error also amounts to undoing an admission made a year prior in his client's plea, more is required. One is left wondering what the actual intentions of his client are, or have always been.¹⁷ It is no wonder that the plaintiff's attorney conveyed his client's concerns to Mr Lombard in an email dated 18 September 2025 as follows: ‘*My client has become concerned that the reason for the delay may be that you are not receiving instructions from your client.*’

¹⁷ See *Rishton v. Rishton*, 1912 T.P.D. 718 at p720.

[32] It is also in that regard that the plaintiff has set out allegations to the effect that the defendant was aware that the tanks were contaminated, as follows:

- ‘30. It does not follow from its denial that the Defendant was a party to the agreement that the Defendant denies the tanks were contaminated. The defendant is aware that the tanks were contaminated. It knows that the tanks were refused entry by the Taiwanese authorities due to contamination. Indeed, on 15 November 2021, Mr Stapelberg and I (on behalf of the plaintiff) met in Kloof, Durban, with Alix Visser (representing Newport), Gary van Niekerk (representing Aspen), and Burger Pretorius representing Illuvia to discuss the contaminated tanks. Visser and van Niekerk made it clear that Aspen and Newport were working together on the problem.
31. Visser said that it would be necessary to have samples drawn from the contaminated tanks in Taiwan, and have the samples analysed again by an independent laboratory, the purpose being to try to establish what the contaminant is. It took about five months for us to get permission from Taiwan customs to draw samples. In the end it was a useless exercise because the laboratory that Newport had identified could not even perform the tests they were asking for. They then sent the samples to a laboratory that we had identified. But they said that the only thing they want to do is re-test the permanganate time, there was no call or request made to try and test for any contaminant, which was supposed to have been the reason for the tests.
32. Permanganate time is a test used to measure the level of oxidizable impurities in a substance by timing how long it takes for a solution of potassium permanganate to change colour. The potassium permanganate solution is pink-orange, and the colour fades to yellow-orange as it reacts with impurities. A longer time before the colour changes indicates a purer sample, while a shorter time signifies more impurities. This test is frequently used for chemicals like methanol, and in the shipping industry to test tank cleanliness.
33. Our laboratory confirmed that the tanks were contaminated. The Defendant is well aware of this. It knows that the tanks were contaminated.”

[33] It is not necessary to determine the veracity and evidential value of the allegations above, and they are a matter for determination in the main trial. However, the allegations re-inforce what is not denied in the un-amended plea, namely that the defendant is, and was, involved in the facts relied upon the particulars. While I accept that Mr Lombard seeks to correct an error he made at the pretrial meeting of 13 July 2024, that is not all that is sought to be amended, and that is not all that needs explaining.

[34] All of this raises questions about what exactly the defendant as client would have wished to have pleaded in his plea. Whilst it may be inferred from the current plea that the defendant could not have intended to admit to breaching the agreement it states it was not a party to, it is not so easy to understand what the intention was regarding the contamination and the circumstances surrounding the refusal of access to Taiwan. That remains unexplained. That is relevant to the question of what the true or real issues between the parties are in the trial.

[35] Also hard to swallow is the delayed period following the letter of 26 August 2024. Whilst the defendant did indeed deliver the initial notice to amend, it allowed it to lapse. According to Mr. Lombard he was awaiting a copy of the transcript which he had requested from the plaintiff's attorney. The evidence indicates that it was provided to him on 5 November 2024 and that it took almost a year for the application to be launched. In fact, on 11 December 2024 the plaintiff's attorney wrote to him pointing to the failure to deliver an amendment application and recording that his client assumed the defendant had no further intention of proceeding with its application to amend. There is no answer to these allegations. Nor does there appear to have been a response to the letter of 11 December 2024.

[36] While the prevailing law is that an application of this nature is near-always admitted, there are some applicable *provisos*, including that the amendment should not result in injustice and prejudice which cannot be cured by a costs order, and that the applicant must furnish sufficient explanation. The applicant has failed to meet the standard of providing sufficient explanation, and it bears the onus in that regard in this application.

[37] As for the prejudice, the plaintiff's claim is that the withdrawal of the admissions will require it to source evidence that it considered to be common cause, and which it has omitted to gather, including in respect of the contamination. The express admissions reached at the pre-trial meeting were significant in the extent to which they limited those issues between the parties. In that context, Mr Lombard as a legal practitioner would have appreciated that fact when he and his client allowed the first notice to amend lapse; and when he failed to respond to the letter of 11 December 2024 from the plaintiff's attorney which specifically recorded that the plaintiff assumed the defendant had no further intention of proceeding with its application to amend; and when he took a further ten months before delivering this application for amendment. That conduct is egregious, if not reckless.

[38] It is common cause that the important aspect in which the plaintiff may be prejudiced in the trial relates to the alleged contamination, including whether the laboratory in Taiwan has retained the relevant samples of the alleged contamination. It is not disputed that there is a strong likelihood in that regard given the length of time that has elapsed. The defendant postulates its suspicion that no report exists from that laboratory. This is not an answer to the plaintiff's

claim of prejudice. The plaintiff also points to its omission to gather evidence relating to the contamination in general as a result of the common cause nature of that aspect thus far, and in response the defendant's affidavit alleges that *'foreign authorities are known to miss-state this position'*, presumably as regards whether or not there is contamination. Neither approach is an answer to the prejudice relied upon by the plaintiff which cannot, at this stage or at trial, be cured by a costs order.

[39] For all the reasons discussed, I am of the view that the application to amend should be refused, and the objection upheld. Given the egregious conduct of the defendant represented by its attorney outlined in this judgment, I am of the view that the defendant should incur the costs of this application, on an attorney and own client basis. There is no reason why the plaintiff should be placed out of pocket for this application.

D. ORDER

[40] In the circumstances the following order is granted:

1. The defendant's application to amend is refused, and the objection is upheld.
2. The defendant is to pay the costs of this application on an attorney and own client scale, including costs of counsel.

N. MANGCU-LOCKWOOD
Judge of the High Court

Appearances:

For plaintiff : S. Vivian SC

Instructed by: F. Biccari, Frank Biccari Attorneys

For defendant: P.S. Bothma

Instructed by C. Lombard, AC Lombard Attorneys