REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHEOTHER JUDGES: ***NO***
(3) REVISED: **NO**

Date: **23 February 2026**

Case Number: **A2022-027541**

In the matter between:

BEST DRIVE HOLDINGS (PTY) LTD	First Appellant
NV CAPITAL (PTY) LTD	Second Appellant
and	
MARTIN HENRY LEWIS	Respondent

Heard: 02 February 2026

Delivered: 23 February 2026 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines,* and by release to SAFLII. The date and time for the hand-down is deemed to be 10:30 on 23 February 2026

ORDER

(1) The appeal is dismissed.

(2) The appellants are ordered to pay the costs of the appeal, including the costs of counsel on scale C, if such costs have been incurred on that scale, otherwise on such lesser scale as may be applicable.

JUDGMENT

Coram: Dlamini J and Marais AJ (Twala J dissenting)

Background

[1] This is an appeal to the Full Court, with leave from the court *a quo*, against the decision in this court on 17 September 2024, when the appellants' application for leave to amend in terms of rule 28(4) was dismissed with costs.

[2] The appellants are the plaintiffs in an action instituted in this court against the respondent, who is the defendant in the action, seeking payment of the sum of R2 million lent and advanced, plus R9 million in interest.

[3] The appellants' action against the defendant is based on a loan agreement concluded on 25 June 2019 ("the 2019 agreement") between the appellants and a company that is now in final liquidation ('the principal debtor"), as well as a deed of suretyship concluded between the appellants and the respondent on 25 July 2018.

[4] In terms of the 2019 agreement:

a. The loan amount was R9 million.

b. The loan amount was payable to the principal debtor by 30 June 2019, and the effective date of the agreement would be 1 July 2019, when repayments of R1 million per month would commence.

c. Interest was payable at the rate of R1 million per month for a period of nine months.

[5] In the deed of suretyship, the respondent bound himself as surety and co-principal debtor in favour of the appellants for the liability of the principal debtor in terms of a loan agreement concluded between the appellants and the principal debtor. The "loan agreement" is not defined in the deed of suretyship, but reference was made in this regard in the particulars of claim to a preceding loan agreement which was concluded, also during 2018. It is common cause that the suretyship referred to the 2018 agreement.

[6] The respondent raised an exception that the particulars of claim failed to disclose a cause of action, on the basis that the plaintiff failed to show that the deed of suretyship concluded in 2018 at the time the 2018 loan agreement was concluded, has any bearing on the loan agreement that was concluded in 2019, and consequently failed to show that the respondent is liable as surety in relation to the 2019 agreement.

The proposed amendment

[7] The appellants do not concede that the exception was well taken, but they have nonetheless given notice of their intention to amend their particulars of claim in accordance with Rule 28(1) on the following basis:

a. It was further alleged that the 2019 loan agreement was a written amendment to a preceding loan agreement concluded between the plaintiffs and the principal debtor on or about 2 August 2018 ("the initial loan agreement"). A true copy of the initial loan agreement was attached.[1]

b. The amendment of the initial loan agreement by the conclusion and terms of the loan agreement was said to be in accordance with the terms of clause

[1] As a proposed paragraph 5A.

12.3 of the initial loan agreement and arose in the circumstances pleaded in (amended) paragraphs 5 and 5.1 to 5.3.[2]

c. The proposed new paragraph 5.1 is to read that the principal debtor approached the plaintiffs voluntarily and of free choice, requesting the roll-over of R7 000 000, 00 [which was due and payable under the initial loan agreement (prior to its amendment as aforesaid) on 30 January 2019] to the loan agreement and the additional advance of R2 000 000, 00 for the purpose of funding another mining project opportunity, on the basis that the roll-over amount of R7 000 000, 00 and the additional advance of R2 000 000, 00 would make up the amended loan amount of R9 000 000, 00 under the loan agreement.3

d. The appellants then proposed to allege that the principal debtor "accordingly" did not repay the R7 million on 30 January 2019, since the sum was rolled over to the (2019) loan agreement as agreed and the repayment date and repayment terms, amongst others, of the initial loan agreement were amended in accordance with the terms of the (2019) loan agreement.[3]

e. A proposed amendment paragraph 6 stated that the appellants performed their joint obligations in terms of the (2019) loan agreement by *inter alia* advancing the additional R2 million to the principal debtor, thereby increasing the total amount of the principal debtor's indebtedness to R9 million.

f. In addition to the existing allegations regarding the deed of suretyship between the appellants and the principal debtor, the appellants seek to allege further that in terms of clause 4.3.3 of the deed of suretyship it was agreed that the appellants and the principal debtor may at all times vary any or all of the terms and conditions of the initial loan agreement as they may deem necessary without prejudice to any of the rights of the appellants

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[2] Proposed paragraph 5A.1.
[3] Proposed paragraph 6A.

against the respondent and that any such variations shall vary the obligations of the respondent owing to the appellants.

g. A proposed amended paragraph 11 states that by reason of clause 4.3.3 of the suretyship and the subsequent amendment of the initial loan agreement (i.e. the 2018 agreement), the respondent remained bound as surety for the due performance of the principal debtor's obligations in terms of the 2019 loan agreement.

h. It was emphasised in a proposed paragraph 11.1 that the respondent is liable in respect of the 2019 loan agreement since it is allegedly an amendment of the 2018 loan agreement.

i. The appellants now seek to claim R9 million capital, plus a further R9 million interest. The court a quo assumed *this* to be a slip of the pen, but before us appellants' counsel confirmed that this was not an error and that this is indeed what the appellants seek to claim by way of the amendment.

The respondent's objections to the proposed amendments

[8] The respondent objected to the proposed amendment, which resulted in an application for leave to amend in terms of rule 28(4). This application was dismissed by the court *a quo*, and it is against this dismissal that this appeal lies.

[9] The respondent's objections were broadly as follows:

a. That the 2019 agreement was clearly not an amendment or variation of the 2018 agreement as:

i. The 2019 agreement makes no reference to the 2018 agreement;

ii. The 2019 agreement makes no reference to the fact that it is a variation of the 2018 agreement;

iii. The 2019 agreement makes no reference or provides any details as to in what respects the 2018 agreement is varied;

iv. The 2019 agreement has an effective date of 1 July 2019, whereas the effective date in the 2018 agreement was 25 July 2018;

v. The 2019 agreement states that the loan amount would be transferred by 30 June 2019, while the 2018 agreement stated that the loan amount would be transferred on 25 July 2018;

vi. The 2019 agreement states that the loan amount was R9 million, whereas the loan amount in the 2018 agreement was R5 million;

vii. Paragraph 11.6 of the 2019 agreement contains a whole agreement clause, which provides that the agreement contains the entire agreement between the parties regarding the subject matter of the agreement and that no party shall be bound by any undertakings, representations, warranties, promises or the like not recorded in the agreement;

viii. The clause further provides that the agreement supersedes all prior agreements, representations, communications, negotiations, and understanding between the parties concerning the subject matter of this agreement;

ix. the 2019 agreement was a novation, and not a variation of the 2018 agreement.

x. The 2019 agreement makes no reference to a deed of suretyship, whereas the 2018 agreement does make such reference.

b. Reference is made to another action instituted by the appellants against the respondent on the 2018 agreement against the respondent for payment of the amount of R7 million, which action is pending after a judgment for R7 million was rescinded.

c. It is stated that if the 2019 agreement is a variation of the 2018 agreement, that there is a *lis pendens*.

[10] The objection concludes with the contention that because the proposed amendment is unsustainable, the objection should be sustained.

The law relating to applications for leave to amend

[11] The principles applicable to applications for amendments are set out in *Erasmus Superior Court Practice* in the discussion of rule 28. We are indebted to the authors for the helpful exposition and the authorities cited in the footnotes. These principles are as follows:

a. A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially.

b. The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.

c. The general approach to be adopted in applications for amendment has been set out in numerous cases. The practical rule is that an amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.

d. The following statement by Watermeyer J in Moolman v Estate Moolman[4] has frequently been relied upon:

> '[T]he 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.'

e. Save in exceptional cases, where the balance of convenience or some such reason might render another course desirable, an amendment ought not be

[4] *Moolman v Estate Moolman* 1927 CPD 27 at 29

allowed where its introduction into the pleading would render such pleading excipiable. In other words, the issue proposed to be introduced by the amendment must be a triable issue.[5] A triable issue is one *(a)* which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant; or *(b)* which, as a matter of probability, will be proved by the evidence so foreshadowed.[6] If the plaintiff's particulars of claim do not disclose a cause of action, an amendment of the defendant's plea thereto would be an exercise in futility.

f. It is stated that the court has on various occasions refused to allow an amendment where, even if it were allowed, the amending party would still have no prospect of success on the amended pleading. An amendment was refused where the new ground of action sought to be imported could be proved only by evidence which would have been inadmissible.[7]

[12] During the argument in this matter, the appellants accepted that the crucial inquiry is whether the amendment is based on a triable issue, in the sense that the evidence foreshadowed by the appellants' application supports the amendment. Counsel for the appellants referred to the judgment of Opperman J in *The Standard Bank of South Africa Limited v 24 Wentworth Village (Pty) Ltd*,[8] where the learned judge held that the issue proposed to be introduced by the amendment must be a triable issue. A triable issue is one that, if proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant, or, as a matter of probability, will be proved by the evidence so foreshadowed. However, an application for leave to amend is not designed to resolve a triable issue; it need only traverse a viable or relevant and triable issue.

[13] Counsel was at pains to point to evidence in the appellants' founding affidavit that allegedly supported the amended cause of action. Whether the evidence

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[5] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641A; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565H–J; *Barnard v Barnard* 2000 (3) SA 741 (C) at 754F.

[6] *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 36I–J

[7] *Lenferna v Jerome* 1925 (1) PH F20 (D)

[8] *The Standard Bank of South Africa Limited v 24 Wentworth Village (Pty) Ltd* 2021 JDR 1555 (GJ) par [15]

indeed supported the amendment will be discussed hereunder. The point is that this matter turns on whether the foreshadowed evidence supports the proposed amendment and is sustainable.

Discussion

Novation

[14] The objection based on the statement that the 2019 agreement was a novation of the earlier agreement was abandoned by the respondent during the hearing of the appeal and need not be considered.

Lis pendens

[15] The objection of *lis pendens* may have some merit. As the particulars of claim stand at the moment, the appellants are not claiming anything agreed upon in the 2018 agreement and *lis pendens* does not arise. In terms of the proposed amendment, the appellants seek to claim R9 million capital plus R9 million interest. Included in the R9 million capital is R7 million agreed upon in terms of the 2018 agreement which was allegedly "rolled over" to the 2019 agreement. R7 million is claimed in both actions for exactly the same alleged debt. The fact that this is claimed in one action under the 2018 agreement, and in the present action under the 2019 agreement, does not matter. On the appellant's version, it is the same debt which was transferred to the 2019 agreement.

[16] This will potentially only be a partially successful defence against the proposed claim, as there is a further R2 million capital and R9 million interest claimed, which is not covered by the *lis pendens* defence.

[17] Counsel for the appellants argued that due to the discretionary nature of a plea of *lis pendens* it would be inappropriate for the court dealing with the amendment to deal with it and contended that this will be the function of the trial court to exercise a discretion based on the evidence before the court. In this regard counsel referred to *Century Civils CC v Calsicrete Brickworks (Pty) Ltd* in which reference was made to *Loader v Durst Bros (Pty) Ltd* where Roper J held that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the

proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject matter. It follows that a plea of *lis pendens* merely stays one or other of the proceedings brought in respect of the same matter and does not require the other action to be dismissed. The balance of convenience and of equity requires that the question of *lis pendens* be dealt with in the main action. It will be convenient for the respondent to plead *lis pendens* either in the main action or the second action.

[18] We are, consequently, of the view that the fact that there is ostensibly a valid plea of *lis pendens* available to the respondent if the amendment is allowed, is not a bar against the amendment. The trial court may potentially rule that the action in the present matter should proceed and that the other action should be stayed. Where the current action will, based on the proposed amendment, deal more widely with the issues between the parties (including the fact that the 2018 agreement is now alleged to have been varied by the 2019 agreement), a trial court may allow the present action to proceed (assuming the amendment is allowed), rather than to stay proceedings.

The* question *whether the amendment is sustainable / raises a triable issue / based on inadmissible evidence

[19] The general objection that the proposed amendment is unsustainable, which, in our view, is intertwined with the other grounds of objection, remains to be considered.

[20] The appellants argued that the court a quo went too far in interpreting the agreements and reaching the conclusions it did. In this regard, we are mindful that a court considering an amendment to the pleadings should refrain from usurping the role of the trial court and deciding a matter as if all the evidence were before the court. It is particularly dangerous for a court to interpret agreements where a variety of factors may, based on the evidence, play a role.

[21] But we do not deem it necessary to make a finding on the correctness of the court *a quo's* reasoning in this regard. Before us, the matter was approached on the basis of the evidence that was foreshadowed by the appellants in the

founding affidavit and pertinently relied upon by their counsel. There was no contention by the appellants that the agreements must be interpreted in any manner other than what is conveyed by the plain language of the agreement.

[22] As set out above, in the exercise of the court's discretion, the court must decide whether the application for amendment is *bona fide* and whether the proposed amendment is sustainable on the evidence foreshadowed in the application for amendment. An amendment will also not be allowed if the proposed new cause of action can be proven only through inadmissible evidence.

[23] A plain reading of the 2018 agreement, relied upon by the appellants in the amendment, reveals the following:

a. The loan amount was R5 million.

b. The loan amount was payable to the principal debtor by the effective date of 25 July 2018; and

c. Interest was payable at the rate of R500 000.00 per month for a period of six months.

[24] A plain reading of the 2019 agreement shows that R9 million capital had to be advanced to the principal debtor in future, i.e. by 30 June 2019.

[25] As part of the proposed amendment (and the evidence foreshadowed), the appellants seek to allege that, although the 2019 agreement expressly provided that a capital amount of R9 million would be advanced to the principal debtor on 30 June 2019, this would not be done. Instead, the R9 million mentioned in the 2019 agreement would have consisted of R7 million "rolled over" from the 2018 agreement, plus a further capital advance of R2 million. This is alleged to be a variation of the 2018 agreement.

[26] Based on the evidence foreshadowed by the appellants, there is no indication that the appellants paid any amount in excess of the R5 million agreed upon under the 2018 agreement. Accordingly, it must be accepted that only R5 million was actually lent and advanced, not R7 million. Anything in excess of R5 million under the 2018 agreement, on the evidence, could only be interest. During

argument, counsel for the appellants obliquely mentioned that a claim may be formulated in the future based on an additional R2 million having been advanced under the 2018 agreement, but there is no evidence on record to support such a claim. Consequently, that possibility should be discounted.

[27] On the facts presented by the appellants, the inclusion of the amount of R5 million (which had already been paid over in 2018) in the capital amount of R9 million that had to be paid over in 2019 was a fiction the parties clearly had no intention of implementing. It was clearly not an amendment to the 2018 agreement.

[28] It is also trite law that interest never loses its identity as interest, even if the interest is capitalised by agreement.[9] On the foreshadowed evidence, the alleged conversion of R2 million interest in terms of the 2018 agreement into capital to be advanced in terms of the 2019 agreement in future, can also be nothing else than a simulated agreement. No effect would have been given to this by the parties, and the allegation of a variation of the 2018 agreement in this regard is similarly untenable.

[29] Despite these realities appearing from the appellants' own version, counsel for the appellants persisted in the contention that the 2019 agreement was a variation of the 2018 agreement and that the appellants will be entitled to adduce extrinsic evidence at trial to shed light on its interpretation.

[30] In this regard, counsel relied on the judgment of the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*[10] where it was held that the integration rule does not prevent a party leading extrinsic evidence in respect of the interpretation of the agreement, and that the appellants will be entitled to lead such evidence during the trial.

[31] But the judgment of the Constitutional Court regarding the interaction between the integration rule and the prohibition against extrinsic evidence, and the

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[9] See *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) at 828 I – J.

[10] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)

principles of contractual interpretation, must be properly understood. The court referred to previous authority holding that the parol evidence rule has two components, i.e., an integration facet and an interpretation facet. The integration facet defines the limits of the contract, and the interpretation facet addresses the interpretation of the agreement. In par. 92 of the judgment, the court held as follows:

> "*The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced.* ***The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement. If UJ had sought to adduce evidence to show the court that the parties had intended to include a pactum de non cedendo, but had failed to do so, this part of the parol evidence rule would have precluded UJ from seeking to add this term to the contract by means of extrinsic evidence.*** *But it is quite clear that UJ did not seek to adduce its evidence for that reason. My reading of its judgment is that the Supreme Court of Appeal's invocation of the parol evidence rule in this case was influenced by its broader view that the whole agreement clause in the lease prevented the High Court from having regard to the contextual evidence adduced by UJ. I have already found that view to have been incorrect. It follows that the parol evidence rule was not an obstacle to the evidence being admitted.*"

[32] The current state of the law is, therefore, that the integration rule does not preclude extrinsic evidence from being led to shed light on the interpretation of the agreement. But if the extrinsic evidence's purpose is to *vary, contradict or add* to a written agreement, the integration rule prevents such evidence from being led.

[33] The evidence relied on by the appellants clearly has the effect of varying, contradicting, or detracting from the express terms of the 2019 agreement.

[34] In particular, to the extent that the 2019 agreement, in express terms, provides that the R9 million loan amount would be paid by 30 June 2019, the foreshadowed evidence and the proposed amendment seek to put forward a conflicting agreement that such amount would not be paid - only R2 million would be paid in the future.

[35] It is conceivable that certain elements of the 2019 agreement could have been intended as a genuine variation of the 2018 agreement, such as varied repayment terms for the original loan and interest, an additional loan amount, and additional interest terms. But this was not expressed in the 2019 agreement. Instead of providing that there would be a variation of the repayment terms of the previous R5 million loan and interest thereon, the 2019 agreement expressly provides for repayment terms in respect of a R9 million loan to be disbursed on a future date. The proposed amendment depends entirely on a version of the agreement that is at variance with the express terms of the agreement, without a claim for rectification. The same goes for the additional interest contained in the 2019 agreement, to the extent that such interest pertained to amounts that were due in terms of the 2018 agreement.

[36] As to the additional R2 million loan and interest thereon, the 2019 agreement did not state that this was a variation of the 2018 agreement. It simply provides for a loan of R9 million. To the extent that the appellants seek to allege that the additional R2 million capital advance included in the R9 million was a variation of the 2018 agreement, this is at odds with the express terms of the agreement. It seeks to read something into the agreement that is simply not there.

[37] Upon proper analysis, based on the foreshadowed evidence, the 2019 agreement evidently did not reflect the parties' intention correctly. Instead of seeking rectification of the agreement, the appellants seek to put forward a different version of the agreement by means of extrinsic evidence.

[38] This extrinsic evidence is clearly not merely evidence supporting the interpretation of the agreement but is contrary to the parol evidence rule and inadmissible.

[39] Confronted with this reality, counsel for the appellants submitted that this was irrelevant because the appellants are allegedly not attempting to enforce this contradictory version of the 2019 agreement. This submission is patently incorrect and must be rejected. The appellants are undoubtedly attempting to enforce the proposed agreement.

[40] To the extent that it is suggested that the 2019 agreement was a variation of the 2018 agreement, this is not supported by the evidence foreshadowed and is unsustainable. The proposed amendment is also based on inadmissible extrinsic evidence. It ought to have been refused.

Reality check: will the appellants be deprived of justice if the amendment is refused?

[41] In *Essence Lading CC v Infiniti Insurance Ltd and Another*[11], it was held in the context of an amendment to the pleadings that the point of departure is that everyone, in terms of s 34 of the Constitution[12], has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 173 provides that the High Court has the inherent power to protect and regulate its own process and to develop the common law, considering the interests of justice. Courts are, therefore, constitutionally enjoined to approach matters like this on the basis that fairness and justice must be promoted.

[42] The question arises as to whether refusing the amendment will comply with the constitutional imperative of a fair and just process and whether an injustice will not be done as a result of that refusal. Refusing an amendment may potentially close the doors of the court to a litigant and cause injustice. Consequently, refusing an amendment must be justified in law.

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[11] *Essence Lading CC v Infiniti Insurance Ltd and Another* 2024 (2) SA 407 (GJ) par {25] to [26]
[12] The Constitution of the Republic of South Africa, 1996

[43] In the present matter, we are of the view that the refusal to allow the amendment was justified in law and that the appellants were obliged to suffer the consequences. Furthermore, this is not the end of the road for the appellants, as alternative causes of action are available to them, provided that such causes of action are properly pleaded, *prima facie* supported by the appellants' evidence, and not based on inadmissible evidence.

[44] Consequently, we are of the view that no injustice was done due to the refusal of the amendment.

Conclusion

[45] The court a *quo's* order in refusing the amendment was correct, and the appeal must be dismissed.

Costs

[46] The costs of this appeal should follow the result.

[47] The appellants should be ordered to pay the costs of the appeal, including the costs of counsel, on Scale C if counsel's costs have been incurred on that scale; otherwise, on such lesser scale as may be applicable.

Order

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

(3) The appeal is dismissed.

(4) The appellants are ordered to pay the costs of the appeal, including the costs of counsel on scale C, if such costs have been incurred on that scale, otherwise on such lesser scale as may be applicable.

[redacted]

DLAMINI JE

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

[redacted]

MARAIS D

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Twala J

[49] I have had the pleasure of reading the judgment of my colleagues. Regretfully I cannot concur with it. I agree with the background facts to this case which are common cause as mentioned in the judgment of the majority. However, I hold the view that the appeal should be upheld, and the amendment be granted with the respondent to pay the costs on scale C.

[50] This is an appeal against the judgment of Graves AJ in the court a quo, dismissing the appellants' application for leave to amend their particulars of claim with costs. The appellants (plaintiffs in the action) sought to amend their particulars of claim to plead that the loan agreement concluded on 25 June 2019 *("the 2019 agreement")* was a written amendment of the earlier loan agreement concluded on 2 August 2018 *("the 2018 agreement")*. The respondent (defendant) opposed the amendment on the grounds that the 2019 agreement

constituted a novation of the 2018 agreement, and that the suretyship signed by the respondent in 2018 did not cover liabilities under the 2019 agreement. The court a quo refused the amendment, holding that the amended pleading would be excipiable.

[51] The legal principles governing amendments are well established. It is trite that amendments are to be granted freely, unless they are sought in bad faith or would cause an injustice that cannot be cured by a costs order. The modern tendency is to allow amendments that facilitate the proper ventilation of disputes.

[52] In *Affordable Medicines Trust and Others v Minister of Health and Another*[13] the Constitutional Court confirmed the principles governing the granting or refusal of amendments which were laid down in *Commercial Union Assurance Co Ltd v Waymark No*[14] and stated the following:

> "The principles governing the granting or refusal of an amendment have been set out in a number of cases. The practical rule that emerges from these cases is 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." These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand."[15]

[53] In *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*[16] the Constitutional Court stated the following:

> "I do not agree. The misapplication of law ordinarily occurs when a legal standard that is correctly stated and adopted is then applied to the facts so as to derive a conclusion that cannot be sustained. So, for example, a crime that requires

[13] (CCT27/04) [2005] ZACC 3; SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005)
[14] 1995 (2) SA 73 (TK) at 76D-76I
[15] Id para 9
[16] 2024 (1) SA 331 (CC)

intention when the facts merely support negligence cannot sustain a conviction because the application of the law to the findings of fact does not support the conclusion that the accused is guilty of the crime. Here, though, the Commissioner of Patents, having cited the well-known principles of law relevant to the application before her, then pronounced and adopted an entirely different and incorrect standard: the interests of justice. That is apparent from the salient passage of her judgment quoted above. It is also apparent from the reasoning adopted by the Commissioner of Patents to arrive at her conclusion. There is no trace in that reasoning that the Commissioner of Patents adopted the relevant legal principles that she had referenced. Nothing is to be found of the permissive principle that amendments are always allowed, unless they are sought in bad faith or would cause an injustice that cannot be remedied by an award of costs. Rather, the Commissioner of Patents adopted and applied a distinct and incorrect standard: the interests of justice. She then exercised her discretion to refuse the application to amend, by recourse to that incorrect standard.[17]

The adoption of an incorrect legal standard to decide an application to amend is to make an error of law. It is not a misapplication of law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure properly to apply the law to the relevant facts. And it is an error of law of no small consequence. The legal principles that are restated in *Affordable Medicines* reflect the constitutional right to have a dispute resolved by the application of law before a court. This entails the right of a litigant to frame the dispute that requires resolution, and in the present matter, to formulate a defence. Hence, the importance of the permissive principle, to which I have referred."[18]

[54] However, an amendment that would render a pleading excipiable may be refused. The test is whether the amended pleading would clearly be excipiable. If it is merely arguable that the pleading might be excipiable, the amendment should be allowed and the excipiability issue left for determination by the trial court.

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[17] Id para 64
[18] Id para 65

[55] In *Crawford-Brunt v Kavnat*[19], dealing with an amendment to a pleading, stated the following:

> "In *Cross v Ferreira* it was laid down that, save in exceptional cases where the balance of convenience or some such reason might render another course desirable, the Court will not allow an amendment to a pleading if the pleading as amended would be excipiable. It seems clear, however, both from a reading of this case and of subsequent cases in which *Cross v Ferreira* has been referred to, that such an amendment will only be refused on the ground that the amended pleading would be excipiable if it is clear that the amendment would obviously render the pleading excipiable. The operative words in the judgment in *Cross v Ferreira* at p. 449 are 'would be excipiable' and not 'may be excipiable'. If the pleading would appear to be possibly open to exception or even if the Court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment."

[56] Where the objection to an amendment turns on the interpretation of a contract, the court should be particularly cautious. Interpretation is often context-dependent, and evidence of surrounding circumstances may be admissible to clarify ambiguity. As a rule, a court dealing with an amendment is not the appropriate forum to settle questions of interpretation, because evidence may be led at trial to cast light on the correct meaning of the contract. Thus, as a general rule, courts are reluctant to decide upon exception question concerning the interpretation of a contract.

[57] In *Heafield v Rodel Financial Services (Pty) Ltd*[20] the court quoted with approval the case of *Myers v Abramson* wherein the following was stated:

> "In *Magnum Simplex International (Pty) Ltd v MEC Provincial Treasury, Provincial Government of Limpopo* [2018] ZASCA 78 para 9, the court stated that before an amendment is granted, there must be some explanation why there is a wish to amend if a case has already been made out in the pleadings.

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[19] 1967 (4) SA 308 (C) at 310F–311B).

[20] [2022] ZAKZDHC 26

As set out in *Trans-Drakensberg*, an explanation must be provided why there is a wish to change or add to the pleadings where a case is already made out. The applicant must show prima facie that a triable issue is being introducedIn Myers v Abramson 1951 (3) SA 438 (C) at 449H, the court stated that since it was permissible to allow the introduction of a new cause of action by way of an amendment, there was no reason why amendments should be limited to instances where there is some evidence to support the cause of action contained in the proposed amendment." [21]

[58] It should be recalled that the amendment was triggered by an exception to the plaintiff's particulars of claim to the summons and the respondent has not yet pleaded thereto. Therefore, in my view, there is no prejudice to be suffered by the respondent which cannot be cured by a costs order should the amendment be granted. Additionally, there is no evidence before this court that the parties concluded the 2019 agreement with no intention to give effect thereto. This is purely speculative at this stage since the evidence to be led at the trial, which is not before this court, may prove otherwise. The admissibility or inadmissibility of the extrinsic evidence should be left to the trial court and not this court dealing with motion proceedings.

[59] The golden thread that runs through the authorities quoted above is that the amendment should be granted in order to allow the parties to ventilate all the issues at the right forum, which is the trial court. It is not for this court to determine the interpretation of the two agreements at this stage and to evaluate the evidence foreshadowing the issues on motion proceedings which are to be determined at the trial after extrinsic evidence has been led to support and prove the link between the two agreements. It is my respectful view therefore that, by doing so, the majority judgment has overstepped the mark and is therefore over-reaching.

[60] Whether the quantum of the claim is R9m or R11m, it is a matter for determination by the trial court after hearing evidence from the parties. It is not desirable for a court in motion proceedings to engage in determining issues

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[21] Id para 29

which are disputed facts between the parties. The triable issue which is foreshadowed by the evidence of the amendment is that the 2019 agreement is an amendment of the 2018 agreement. Further, extrinsic evidence will be lead at the trial for the court to determine whether the two agreements are linked to each other and in what respect. That is where the interpretative process will occur and not in the motion court which is incapable of resolving disputes of fact on the papers.

[61] In *Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd*[22] the court stated the following regarding amendments:

> "The amendment must be bona fide and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue"
>
> "Having already made his case in his pleadings, if he wishes to change or add to this he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue of which he has no supporting evidence where evidence requires or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

[62] There is no evidence before this court that the appellant is malicious in its quest to effect the amendment to its pleading. Further, as indicated above, the triable issue which is foreshadowed by evidence in the founding affidavit is the interlink of the two agreements and proof thereof can only be determined after extrinsic evidence has been led at the trial. Additionally, after the abandonment of the novation ground of objection by the respondent and the finding by the majority judgment that the lis pendens issue should be determined at the trial, nothing suggest that the amendment of the pleading is clearly excipiable as noted in the authorities quoted above.

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[22] 1967 (3) SA 632 (D) at 640H-641

[63] It is unfathomable that the respondent raised several grounds of objection to the amendment but according to the majority succeeded on only one and as a result thereof the whole amendment should be refused. The basis upon which the appeal is refused by the majority judgment is that the evidence foreshadowing the amendment does not support that the 2019 agreement was a variation of the 2018 agreement and is therefore unsustainable and that the amendment is based on inadmissible extrinsic evidence.

[64] It is my considered view that the determination of the interlink between the two agreements is a matter of interpretation of both agreements by the trial court before which extrinsic evidence will be led to ascertain the intention of the parties. It is not open to this court to determine whether the extrinsic evidence is admissible or not but that is in the domain of the trial court which has a wide discretion in determining such issues.

[65] It is my respectful view that the refusal to grant the amendment deprived the appellant of justice as guaranteed by section 34 of the Constitution of the Republic of South Africa.[23] The reality of the cases of this nature is to allow the parties to ventilate the issues at the right forum and not to deprive the other litigant the right to have his or her dispute resolved by the application of law decided in a fair public hearing before the court. It is the appellant who would be prejudiced by the refusal of the amendment, whereas its granting would not have caused any harm or prejudiced to the respondent which could not be cured by a costs order.

[23] Act 108 of 1996

[66] Had I commanded the majority, I would have upheld the appeal and granted the amendment with the respondent to pay the costs On Scale C.

[redacted]

TWALA ML

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

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