



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

JUDGMENT

Case no: A300/2025

In the matter between:

RALF PARDEMANN N O

First Appellant

HOLGER KNUF N O

Second Appellant

OLE LASSE RIECKEN N O

Third Appellant

**(in their capacities as trustees of the
HPO International Trust)**

and

GLEN CHARLES HARE -BOWERS

First Respondent

MADRI HARE-BOWERS

Second Respondent

Coram: JUSTICE J CLOETE *et* ACTING JUSTICE T MGENGWANA

Heard: 20 MARCH 2026

Delivered electronically : 5 MAY 2026

ORDER

1. The appeal succeeds with no order as to costs.
2. The order of the court a quo is set aside and substituted with the following:
 - ‘1. Save for what is sought to be introduced as para 19.4 at para 4 of the defendants’ notice of intention to amend dated 13 June 2025, the amendments sought in such notice in respect of both the defendants’ plea and counterclaim are allowed.
 2. The costs of the application to amend shall be costs in the cause.’

JUDGMENT

Cloete J (Mgengwana AJ concurring) :

Introduction

[1] This is an appeal against the judgment and order of the Magistrate’s Court for the District of Somerset West (the court a quo) handed down ex tempore on 9 September 2025. The respondents abide the outcome of the appeal.

[2] The court a quo dismissed, with costs, an application by the appellants (as defendants) for leave to amend their plea and counterclaim in a pending civil action. In the action, the respondents have sued the appellants (who are the

trustees of the HPO International Trust, hereinafter the ‘Trust’) for repayment of a rental deposit of R100 000; reduction of rental, alternatively damages, of R200 000; an accounting in respect of interest accrued on the aforementioned deposit; and costs on the scale as between attorney and client.

[3] The dispute has its origin in a written lease agreement concluded between the parties, in terms of which the Trust leased a residential property in Somerset West to the respondents (the property). In their particulars of claim the respondents allege, *inter alia*, that in terms of the lease the Trust was obliged to remedy all material defects in the property, but failed to do so timeously or at all, and/or intentionally failed to disclose certain other defects of which the respondents were not aware at the time of ingoing formal inspection.

[4] In its unamended form the Trust’s plea is to the effect that it was only responsible for defects of a material nature identified at ingoing inspection that might render the property uninhabitable; none of the defects listed in the ingoing inspection report were identified by the parties as falling into this category; at conclusion of the lease as well as the ingoing inspection the Trust was not aware of any material defects as contemplated, or in general; and that later problems pertaining to water seepage and leakage were caused by subsequent severe weather conditions, and in any event did not render the leased property uninhabitable.

[5] The Trust has also pleaded that it is entitled to retain the deposit of R100 000 paid by the respondents as a reasonable termination penalty in accordance with clause 1.3 of the lease. It has filed a conditional counterclaim for this amount to cater for a possible finding by the trial court that the deposit is not capable of set-off, together with a (separate) counterclaim for alleged holding over by a sub-lessee.

Amendments sought

[6] The Trust subsequently served a notice of intention to amend its plea and counterclaim. I will endeavour to isolate the substance of the amendments sought. First, the respondents also pleaded in para 9.5 of the particulars of claim that in terms of the lease, there was to be an ingoing inspection, and the ingoing inspection report was to indicate : (a) all material defects; and (b) which of these defects the parties agreed were to be remedied prior to them taking occupation, and which within 10 days thereafter.

[7] In paras 8 to 10 of its unamended plea, the Trust admitted that in terms of the lease the parties were to conduct an ingoing inspection prior to the respondents occupying the property, but alleged that the '*relevant timeline were*' (sic) relaxed in light of the respondents' specific request to take earlier occupation. The Trust denied that both provisions of the lease pleaded by the respondents were an accurate reflection thereof. It alleged that: (a) clause 3.2.1 of the lease refers to all material defects *that may render the property uninhabitable*; none listed were identified by the parties as falling into this category; and at no stage thereafter had the respondents claimed this to be the case; and (b) clause 3.2.2 of the lease refers instead to *any other defects* which the parties agreed would be attended to either prior to occupation or within 10 days thereafter.

[8] In its notice to amend, the Trust seeks to withdraw its allegation about the alleged relaxation of the timeline(s) pertaining to the ingoing inspection, while persisting with its other allegations.

[9] Second, the respondents alleged in para 11 of the particulars of claim that the Trust failed, within the '*time period*' prescribed in clause 3.2.2, to repair or replace the items listed immediately thereunder. In paras 18 and 19 of its unamended plea, the Trust admitted that not all the '*other items*' listed in the ingoing inspection report were repaired or replaced within the '*time period*' prescribed due to the alleged relaxation of such period, alleging that this was

because the parties concluded a different contractual arrangement in respect of some items as well as others not listed.

[10] In its notice to amend the Trust : (a) seeks to admit the respondents' averment that those items listed by them were not attended to within the '*time period*' prescribed in the lease, and to abandon reliance on its other averments pertaining to relaxation and a different contractual arrangement; and (b) seeks to introduce allegations that its failure to do so was not a material breach warranting cancellation of the lease by the respondents, alternatively, that the respondents elected to continue with the lease notwithstanding the alleged breach, and thus waived any right to cancel.

[11] Third, in paras 14 and 15 of their particulars of claim the respondents alleged that despite repeated demand and '*the provision of a reasonable period of time*', the Trust failed to remedy the defects, which was necessary to procure that the property was rendered habitable and did not present security and other risks, including a burglary which occurred anon about 18 July 2024; and that as a result they were not provided with the '*full and safe use*' of the property.

[12] In paras 25 and 26 of its unamended plea, while admitting having been informed of an alleged burglary, the Trust persisted with its averments concerning relaxation of the time period(s) and the water leakage/ seeping issue. In its notice to amend, the Trust seeks to consequentially amend these paragraphs in order to render them consistent with its new averments dealt with in para 10 of this judgment.

[13] Fourth, the Trust seeks to amend a patent error in para 29 of its plea where it is stated *Defendants hereof are admitted* to reflect '*the contents hereof are admitted*'.

[14] Fifth, in para 19 of their particulars of claim the respondents alleged that as a result of the Trust's alleged breaches, they became entitled to a proportionate reduction in rental, alternatively damages, of R200 000. In para 31 of its unamended plea, the Trust essentially repeated the basis for its denial of liability. In its notice to amend, and in light of the other amendments sought, the Trust now seeks to merely deny liability.

[15] Sixth, in its notice to amend its counterclaim, the Trust wishes to reduce its *quantum* of damages for alleged holding over by the sub-lessee, not only in respect of the period for which it was calculated , but also by deducting the deposit of R100 000, i.e. its alleged entitlement to a reasonable termination penalty as stipulated in clause 1.3 of the lease. As mentioned earlier in this judgment, the termination penalty is claimed separately and conditionally in the Trust's counterclaim.

The respondents' stance to the amendments sought

[16] The Trust's plea and counterclaim were delivered on 15 May 2025. The respondents first delivered a notice to remove causes of complaint on various grounds, and thereafter a notice of exception on 18 June 2025. By the time the notice of exception was delivered, the Trust had served its notice to amend on 13 June 2025. The respondents then delivered a notice of objection to the notice to amend on 19 June 2025.

[17] The grounds of objection may be summarised as follows. First, it was alleged that para 2.1 of the unamended plea contained an admission, which the Trust was purporting to withdraw by way of the intended amendment. Given that there is no para 2.1 in the unamended plea this need not be considered further. Second, it was contended that the effect of certain amendments sought would render the plea vague and embarrassing, alternatively bad in law because of allegedly contradictory averments. Despite carefully attempting to discern

what exactly the objection was on this score, I am unable to fathom it, given the confusing manner in which it was formulated.

[18] Third, it was alleged that because the Trust had not identified which defects it averred were remedied, this would render the amended plea vague and embarrassing. Fourth, the waiver which the Trust sought to introduce (in the alternative) was at odds with clause 22 of the lease, an aspect to which I return later in this judgment. Fifth, the abandonment by the Trust of its reliance on relaxation of the time period(s) in the lease to remedy any defects was contended to amount to the withdrawal of an admission. Sixth, it was alleged that the Trust was seeking to claim both a penalty and damages in respect of the same act, which was not permitted in terms of the Conventional Penalties Act.¹

[19] The Trust thereafter brought its application for leave to amend, which was also opposed, and fully argued before the court a quo on 9 September 2025, after which it handed down an ex tempore judgment.

The court a quo's judgment

[20] The court a quo declined to make any finding pertaining to the amendment sought in respect of the alleged waiver, on the basis that there was a factual dispute that '*may very well require more evidence*'. Here the court a quo erred. Evidence would only have followed if the amendment sought was granted, and any submissions made by the parties' respective legal representatives during argument about such a dispute could never have constituted evidence.

[21] On the Conventional Penalties Act objection, the court a quo found that, based on submissions made during argument, there was an agreement between

¹ Conventional Penalties Act 15 of 1992.

the parties that this was to be dealt with in the exception raised by the respondents in due course. This is not borne out by the transcript of the argument with which we were also provided. At an early stage of his address, counsel for the Trust stated as follows:

“There is an aspect which has arisen now shortly before proceedings which is, I was informed, that I understand that one of the grounds of objection raised by the plaintiffs to the amendment, is not going to be addressed in this application to amend on the basis that the plaintiffs intend to raise it in an exception to be set down separately.

Now there was correspondence from the plaintiff’s attorney in which that was set out. My instructions are that my attorney understood that to mean that the plaintiff intended to proceed with the exception on that point² in any event. However my submission to Your Worship is that, that ground is before the Court.

Now the Court, as I have said, and it remains ³ to identify it, I will return to it, to a point raised in respect of the Conventional Penalties Act.

My submission Your Worship is that the point is before the Court now and although, as I have already set out the exception is not before the Court, there is an identity of grounds between the opposition to the amendment and the exception. And in due course, if this Court deems it fit to permit the amendment, then should the plaintiffs wish to proceed with an exception, it would be open to the defendants to say those issues have already been determined within the context of an opposed application to amend...”

[22] In his address, the respondents’ attorney stated:

“Your Worship, the Conventional Penalties Act aspect, I regret we have to tell you what transpired between [the] attorneys. When this matter was set down, I contacted my learned friend, the attorney... and told him that we would not proceed with the Conventional Penalties objection at this hearing today. In fact I confirmed that in a letter to him. And we agreed that, that would be without prejudice to my right to raise it in the exception. So why we are proceeding with it, in the face of such an agreement, I do not know.”

[23] In his reply, counsel for the Trust stated:

“... as I understood his statement at court, it would be without prejudice to his right to rely⁴ on it for exception, well, that doesn’t amount on that statement to an agreement that it would not be dealt with in these proceedings. So my respectful point is that can still be dealt with in these proceedings.”

[24] There was thus a dispute between the legal representatives as to whether or not the Conventional Penalties Act point was to be determined in the

² Incorrectly typed in the transcript as ‘pace’.

³ Incorrectly typed in the transcript as ‘relates’.

⁴ Incorrectly typed in the transcript as ‘allow’.

application to amend. However, and without more, the court a quo reasoned as follows:

“It seems to be common cause that there was a without prejudice agreement, that that point would not be taken today. Now for some reason counsel for the applicant has persisted with it. It is very difficult for me to see the leaves for the trees in these circumstances. The submission made by Mr Kulenkampff was that there was an agreement that the point would not be taken . And that was not challenged in reply. In fact, the only point that was made was that there was nothing, because the point had originally been taken on the papers, there was nothing wrong with assisting it today. Whether that is in fact a sign of good faith or not, I am not going to make any findings on. But it certainly leaves a bad taste in my mouth if that was the position.”

[25] This too was an error by the court a quo. It was in no position to make what was essentially a credibility finding against one officer of the court against another. The letter upon which the respondents’ attorney relied was also not made available to it, and no evidence was adduced on what had in fact been agreed. In these circumstances the court a quo was obliged to deal with the point in the absence of an unequivocal abandonment thereof by the respondents.

[26] The court a quo’s reasoning in respect of the remainder of the amendments sought was as follows:

“And I will now return to the rest of the points that were raised, which are for consideration today. I am certainly not of the view that the applicants have discharged the onus with regards to showing that the respondents would not suffer prejudice, should the amendment be granted. It has certainly not shown that should the amendment be granted, that it would be able to be compensated by way of a cost order... the application for the amendment for many reasons, which I will elaborate on, if so required, is refused.”

[27] Despite the court a quo’s indication that it would provide full reasons if required, the Trust’s subsequent formal request for such reasons was met with the following response by that court: ‘Be further advised that the undersigned rendered full reasons and there is nothing more to add. I attach a copy of the full transcript including the ruling.’

[28] The consequence is that as a court of appeal we are left in the dark about what the court a quo took into account in the exercise of its discretion in refusing the amendments sought. So too are the parties. It has repeatedly been stated by both the Constitutional Court and the Supreme Court of Appeal that,

where a matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the presiding officer's decision, as is the court which is seized with any appeal from that decision. Indeed the Constitutional Court has expressed the view that it may well be, where a decision is subject to appeal, that it would be a violation of the constitutional right of access to courts if reasons are not provided.⁵

Whether the amendments sought should be granted

[29] It is evident however that the principal bases on which the application for leave to amend was dismissed were the court a quo's findings that the Trust had failed to demonstrate that its application was bona fide, or that an order for costs would cure any prejudice to the respondents.

[30] The discretion of a court seized with an application to amend is a true, or wide one, to be exercised judicially. The primary object of allowing an amendment is to ensure a proper ventilation of the disputes between the parties, so as to determine the real issues so that justice may be done. The practical rule is that an amendment will not be allowed where the application is made mala fide or if it will cause the other party such prejudice or injustice as cannot be cured by an order for costs and, where appropriate, a postponement : *Macsteel*.⁶ The question is thus whether what the interests of justice demand : *Affordable Medicines*.⁷ In the context of an appeal against the exercise of a true discretion, a court will be slow to interfere unless satisfied that the discretion was not exercised judicially or was influenced by the wrong principles: *Trencon*.⁸

[31] The onus lies on the party seeking an amendment to establish that it is made bona fide and that the other party will not be prejudiced by it: see inter alia *Krischke*.⁹ Considerations of prejudice include whether or not the

⁵ Botes v Nedbank Ltd 1982 (3) SA 27 (A) at 27H-28A; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) at 561A-E; *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12; *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) at 96 G-H; *4 Seasons Logistics CC v Kgotse* (1215/2023) [2026] ZASCA 9 (4 February 2026) paras 28 - 30.

⁶ *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (680/2020) [2021] ZASCA 178 (17 December 2021) para 24.

⁷ *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC) para 9.

⁸ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 88.

⁹ *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363 C-D and the authorities referred to therein.

amendment sought *will* render the pleading excipiable¹⁰ ; and to this extent the test on exception, as well as the party upon whom the onus lies on exception, become relevant.

[32] From what can be gleaned from their notice of objection, the thrust of the respondents' objections to the amendments sought were that, if granted, the plea and counterclaim would be rendered excipiable on one or other basis. Accordingly, in the absence of mala fides, it was incumbent on the respondents to demonstrate that upon every interpretation which the pleadings in question, if amended, could reasonably bear, they would be excipiable. Put differently, it is impermissible to except to part of a pleading, unless it is a self-contained cause of action or defence: *Jowell*.¹¹ Mala fides with regard to the amendments themselves was not suggested by the respondents. The court a quo was thus required to examine each amendment sought in order to determine whether or not it would have the consequence of rendering the pleading in question excipiable. This that court failed to do.

[33] In addition to not having the benefit of the court a quo's reasoning, the notice of objection is in large measure unhelpful to us, given the confusing manner in which it was drafted, despite the requirement that a litigant in the position of the respondents is to make out a clear, strong case : see inter alia *Ras*.¹² With this in mind I turn to consider those grounds of objection which I have been able to fathom and which are summarised earlier in this judgment. For the reasons already given, it is not necessary to deal with the first ground, and it is not possible to discern the second.

[34] The third ground pertains to the contention that because the Trust had not identified which defects it averred were remedied, this would render the amended plea vague and embarrassing. However, a litigant is required to plead *facta probanda* and not *facta probantia*. It will be open to the respondents to request further particulars for purposes of trial. It is also open to the parties to adduce evidence in due course. As was held in *McKelvey*,¹³ if evidence can be led to disclose a cause of action (or defence) alleged in a pleading, the pleading is not excipiable.

¹⁰ See inter alia *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G; *Krischke* fn 9 supra at 363 A-B.

¹¹ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902 J.

¹² *South African National Parks v Ras* [2001] 4 All SA 380 (C) , citing *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630.

¹³ *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526 D-E.

[35] The amendment sought must also be considered in light of the pleading as a whole. The Trust's averment it seeks to introduce is that its failure to remedy all the defects was not a material breach warranting cancellation of the lease by the respondents, alternatively, that the respondents elected to continue with the lease notwithstanding the alleged breach, and thus waived any right to cancel. The Trust persists with the allegations in its unamended plea pertaining to clauses 3.2.1 and 3.2.2 of the lease, namely that material defects were limited to those that might render the property *uninhabitable*; none listed were identified by the parties as falling into this category; and it was *other defects* which the parties agreed would be attended to prior to occupation or within 10 days thereafter. Read together the amendment sought, save for what follows, will not render the plea excipiable.

[36] The fourth ground pertains to the alternative allegation of waiver which the Trust seeks to introduce. Here the respondent's objection has merit. Clause 22 of the lease is the non-variation clause and reads as follows:

“This agreement contains all the conditions of the lease and no agreement at variance with any term of this lease, or addendum or supplement to this agreement or cancellation thereof, or waiver by any party of its rights or any aspect hereof, inclusive of this clause, shall be binding upon the parties unless contained in a written document signed by the LESSOR and the LESSEE.” (my emphasis)

[37] In *Phoenix Salt*¹⁴ the Supreme Court of Appeal was faced with non-variation clauses which stipulated that : (a) neither party would be bound by any representation, express or implied term, warranty, promise or the like not recorded in the agreement or reduced to writing and signed by the parties or their representatives; and (b) no addition to, variation or agreed cancellation of the agreement or the annexure thereto would be of any force or effect unless in writing and signed by or on behalf of the parties.

[38] One of the issues was whether the appellant's waiver of its right to claim the remaining loan amount, which had not been reduced to writing and signed by the parties, was competent in the face of the non-variation clauses. The Court concluded that the waiver was valid on the basis that the non-variation

¹⁴ *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* 2026 (1) SA 460 (SCA).

clauses did not address unilateral waiver of contractual rights.¹⁵ This stands in contrast to the non-variation clause in the present matter, which specifically refers to a waiver. Accordingly, if this portion of the intended amendment in its current form is allowed, it will immediately be hit by clause 22 and this will render the pleading excipiable in respect of the alternative defence which the Trust seeks to introduce. This finding does not however preclude the Trust from seeking an amendment of this nature which complies with clause 22; however at present the manner in which it is pleaded does not withstand scrutiny.

[39] Turning now to the fifth ground of objection, namely that the abandonment by the Trust of its reliance on relaxation of the time period(s) in the lease to remedy any defects was contended to amount to the withdrawal of an admission. In my view, the abandonment which the Trust seeks to introduce is rather the introduction of an admission as opposed to the withdrawal thereof. In these circumstances it is difficult to discern how there can any prejudice to the respondents. The amendment sought will also not render the pleading excipiable.

[40] The sixth ground is the last. The respondent's objection is that the amendment sought by the Trust will have the effect of claiming both a penalty and damages in respect of the same act, which is not permitted in terms of the Conventional Penalties Act. The aforementioned Act defines a recoverable penalty stipulation¹⁶ as being one :

“...whereby it is provided that any person shall, *in respect of an act or omission in conflict with a contractual obligation*, be liable to pay a sum of money or to deliver or perform anything for the benefit of another person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages...” (my emphasis)

[41] Section 2(1) of the Act provides as follows:

“A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.”

[42] Clause 1.3 of the lease reads thus:

¹⁵ Phoenix Salt fn 14 supra at paras 13-18.

¹⁶ Section 1(1) of the Conventional Penalties Act.

“In the event of the LESSEE giving 20 days notice in terms of Section 14(2)(b)(i)(bb) of the CPA to terminate the lease then it is agreed that a reasonable termination penalty in terms of Section 14(3)(a) and (b) is two months rental which shall be paid against notice of termination to the LESSORS.”

[43] The reference to the CPA is to the Consumer Protection Act¹⁷ and not the Conventional Penalties Act. Under s 14(3)(a) of the Consumer Protection Act, the ‘consumer’ remains liable to the ‘supplier’ for any amounts owed to the supplier *in terms of the contract in question* up to the date of cancellation. Under s 14(3)(b), the supplier may impose a reasonable penalty in contemplation of the agreement enduring for the intended fixed term.

[44] Accordingly, when regard is had to the definition of ‘penalty stipulation’ in the Conventional Penalties Act read together with s 2(1) thereof, as well as clause 1.3 of the lease and ss 14(3)(a) and (b) of the Consumer Protection Act, the alleged ‘act or omission’ upon which the Trust seeks to rely by way of its intended amendment, is the early termination *in terms of the contract*, i.e. it is *not* an act or omission *in conflict with* a contractual obligation. The amendment sought is to reduce the quantum of damages for alleged holding over by the sub-lessee, not only in respect of the period for which it was calculated, *but also* by the alleged entitlement to the penalty under clause 1.3 of the lease.

[45] The question to be answered is thus whether the damages component of the counterclaim arises from the same act or omission. In my view it does not. The penalty stipulation pertains only to the early termination of the lease (whether justified or not, which is not an issue before us). The damages component flows however, not from the early termination, but from alleged holding over by the sub-lessee pursuant to that termination. As previously stated, the intended amendment expressly accounts separately for the termination penalty, and excludes it from the loss claimed by the Trust. It follows that this amendment should be allowed.

Costs

¹⁷ Consumer Protection Act 68 of 2008.

[46] The Trust seeks an order that the respondents be liable for the costs of the appeal. However, the respondents did not oppose the appeal; they have been partially successful in their opposition to the proposed amendments; and in fairness to them, they were left as much in the dark as to how the court a quo reached its conclusion as were the Trust and this court. In the circumstances it is my view that there should be no order as to costs in the appeal. As far as the costs of the application to amend are concerned, the Trust asks that the court a quo's order be substituted with one that costs be costs in the cause. Given the particular circumstances of what occurred in the court a quo, it seems to me that such an order is appropriate.

Order

[47] The following order is made:

- 1. The appeal succeeds with no order as to costs.**
- 2. The order of the court a quo is set aside and substituted with the following:**
 - '1. Save for what is sought to be introduced as para 19.4 at para 4 of the defendants' notice of intention to amend dated 13 June 2025, the amendments sought in such notice in respect of both the defendants' plea and counterclaim are allowed.**
 - 2. The costs of the application to amend shall be costs in the cause.'**

J I CLOETE

JUDGE OF THE HIGH COURT

I agree

T J MGENGWANA

ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant : Adv J Whitaker

Instructed by: Brits & Matthee (Mr P Brits)

For respondent: Kulenkampff & Associates (Mr D Kulenkampff)

NO APPEARANCE- ABIDE