



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no 7236/2013

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

Date: 22 April 2026

In the matter between:

PRIMALL MEDIA (PTY) LTD

Plaintiff

and

**iPOINT MARKETING CC
HYPROP INVESTMENTS LTD
ELLERINE BROTHERS (PTY) LTD**

First Defendant
Second Defendant
Third Defendant

JUDGMENT

Introduction

[1] This matter concerns two interlocutory applications in long-running commercial litigation between Primall Media (Pty) Ltd (Primall) and iPoint Marketing CC (iPoint). The parties are cited as they are in the action for ease of reference, and will be referred to as “Primall” and “iPoint” for readability.

[2] Primall seeks the dismissal of iPoint's counterclaim for want of prosecution. iPoint seeks leave to amend its counterclaim. Although the applications are procedurally distinct, they are closely connected, because Primall's case is that the

way in which the counterclaim has been prosecuted, expanded and reformulated over time has now made a fair trial impossible, while iPoint contends that the proposed amendment merely addresses issues already in the case and updates the quantification of the loss it says it has suffered.

[3] It is convenient to address the dismissal application first. If the counterclaim is dismissed, the amendment application largely falls away. If it does not, I must still decide whether the amendment now sought should be permitted.

Factual setting

[4] The litigation has its origin in a written Licensing and Service Agreement concluded in May 2008 between Primall and iPoint. Under that agreement, Primall utilised iPoint's software and devices for digital advertising installations in shopping malls. The agreement was amended by addenda over time, including an addendum in October 2009 under which licence fees were linked to Primall's net advertising revenue generated from sales on the devices.

[5] The agreement endured for a fixed period of five years and expired on 20 May 2013 by effluxion of time, without renewal. By then, disputes had already arisen between the parties. On Primall's version, once the agreement expired in May 2013, its claim in convention became moot. It says that from that point onward it no longer required, and could no longer obtain, the substantive final relief originally pursued in the action, with the result that the real live controversy became iPoint's counterclaim. That proposition featured prominently in Primall's affidavits and oral argument. It formed part of its submission that iPoint, as dominus litis in reconvention, thereafter bore the duty to prosecute the matter diligently to finality.

[6] Primall instituted its action in 2013. iPoint delivered its plea and counterclaim on 3 February 2014. From the outset, the counterclaim was wide-ranging. It relied on the written Licence Agreement, certain alleged oral agreements, unpaid licence fees, project management and design-related claims, and claims connected to iPoint's asserted right, on termination of the agreement, to acquire a portion of the digital devices from Primall.

[7] In relation to the devices, iPoint's case from the start was that the Licence Agreement obliged Primall, upon termination, to sell or make available a specified portion of the devices to iPoint at R500 per device, and that Primall failed or refused to do so. iPoint also claimed damages in the form of loss of profits, said to arise from its inability to redeploy the devices and generate advertising revenue from them.

[8] The counterclaim was amended several times. Over time, the amount claimed expanded substantially, from a figure in the region of R3.6 million at inception, to approximately R13.8 million after the 2016 to 2018 reformulation, and then to roughly R14 million in 2020. By 2025, through the proposed new amendment, the amount claimed had increased to approximately R34 million.

[9] Primall's case is that this history reveals a counterclaim that has never crystallised into a stable and triable form. iPoint's case is that the history reflects a matter that has consistently been pursued, albeit slowly and imperfectly, through amendments, discovery, expert processes, case management, and repeated attempts to settle the dispute or refer it to alternative dispute resolution.

Procedural history in outline

[10] After iPoint delivered its plea and counterclaim in February 2014, Primall excepted to the counterclaim and delivered a Rule 30 notice. Thereafter, there were further notices of intention to amend, objections, a condonation application, a grant of leave to amend in December 2017, special pleas, discovery steps, replication, and, later, a further amendment in 2020.

[11] Primall amended its special plea and plea to the counterclaim in November 2020. Importantly, in that amended plea, Primall pleaded that on 9 May 2019 and again on 13 June 2019, it tendered delivery of 40 of the devices listed in annexure A to the Licence Agreement to iPoint in exchange for payment of R500 per device. That plea introduced Primall's reliance on the 2019 tender as an answer, or partial answer, to iPoint's case about non-delivery.

[12] Thereafter, the matter did not proceed to trial. Primall's version is that, from late 2020 to late 2024, very little of substance occurred in prosecuting the counterclaim, and that, while there may have been settlement or mediation discussions, iPoint remained obliged to prosecute its case and was not entitled to leave the matter dormant. Primall expressly submitted that negotiations and mediation efforts do not suspend the obligation resting on a claimant to drive its case to finality.

[13] iPoint answers that it remained in constant contact with its legal representatives and with Primall's representatives; that there were ongoing efforts to resolve the matter commercially; that it engaged experts and revised its quantification methodology; that there were settlement discussions in 2023 and 2024; and that the matter was ultimately transferred to the Commercial Court, followed by case management and a pre-trial process in early 2025.

[14] On 20 March 2025, iPoint delivered a further notice of intention to amend its counterclaim. Primall objected on 4 April 2025. iPoint did not deliver its application for leave to amend within the ten days specified in rule 28(4), but only on 4 June 2025. Primall then, both in affidavit and in argument, submitted that the notice had lapsed and that the amendment application was therefore procedurally incompetent. Thereafter, Primall launched its counter-application to dismiss the counterclaim for want of prosecution.

Dismissal application

[15] Both parties accepted that this Court has the power, in an appropriate case, to dismiss a claim for want of prosecution. Both also accepted that the remedy is exceptional because it prevents a litigant from having the dispute determined at trial. The debate was not about whether the power exists, but about the circumstances in which its exercise is justified.

[16] The authorities referred to in argument include *Sanford v Haley NO*,¹ *Gopaul v Subbamah*,² and *Cassimjee v Minister of Finance*³ (among others). In *Sanford*, the Cape High Court, as it then was, stated (references omitted)

"[8] In terms of s 173 of the Constitution the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interest of justice. It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will exercise such power in circumstances where there has been a clear abuse of the process of Court."

[17] The Court then set out the requirements: i) there should be a delay, ii) the delay must be inexcusable, and iii) such a delay must prejudice the other party.

[18] In *Gopaul*,⁴ the Durban High Court stated something similar:

"It is clear that the High Court of South Africa has an inherent power to dismiss an action on account of a delay in its prosecution by the plaintiff. What is less clear is the circumstances under which a Court will exercise such power. The various decisions in point were discussed in *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W). There Flemming DJP held that the fact that a plaintiff had permitted an unreasonable time to elapse before taking the next procedural step in an action, was not in itself conclusive. Nor was it conclusive that such delay had caused prejudice to the defendant. The question was 'whether there is A behaviour which oversteps the threshold of legitimacy'.

It appears to me that the proper approach is for the Court to weigh up the period of the delay and the reasons therefor, on the one hand and the prejudice, if any, caused to

¹ 2004 (3) SA 296 (C).

² 2002 (6) SA 551 (D).

³ 2014 (3) SA 198 (SCA).

⁴ At 558-559.

the defendant, on the other. Thus, there may be cases in which the delay is relatively slight but serious prejudice has been caused to the defendant."

[19] These approaches have been endorsed by the Supreme Court of Appeal in *Cassimjee*. Read together, they show that the enquiry is fact-specific and directed to fairness and the interests of justice.⁵ Relevant considerations include the existence and extent of the delay, the adequacy of the explanation offered, the responsibility for the delay, the use or non-use of available procedural mechanisms, and, importantly, whether the delay has caused prejudice so serious that a fair trial is no longer possible.

[20] Dismissal is therefore not a response to a delay in the abstract. It is a remedy for delay of such a character and with such consequences that it becomes unjust to require the other party to meet the claim at trial.

Delay and prosecution of the counterclaim

[21] There has undoubtedly been a significant delay. The counterclaim has existed since 2014. Twelve years later, it has still not been heard. It has undergone repeated amendments and has grown dramatically in scope and quantum. iPoint's explanation for each period of delay is unsatisfactory, particularly regarding why the current amendment was sought only in 2025, years after the 2019 tender on which part of the amended case is based.

[22] That said, the matter cannot fairly be characterised as one in which nothing happened for years on end. iPoint placed a detailed chronology of procedural steps before me. That chronology records objections, amendment processes, condonation proceedings, discovery, device inspections, exchanges under the rules, case management, changes of attorneys, and later settlement and mediation efforts. Primall criticised aspects of the chronology, and contended that some of the material related to privileged settlement communications, but it did not seriously dispute that there had been ongoing procedural and engagement activity over much of the life of the matter.

⁵ In section 173 of the Constitution, see *Naude v Breda N.O* [2022] ZAGPPHC 855.

[23] The picture that emerges is not one of complete abandonment. It is one of slow, uneven, and often unsatisfactory litigation, punctuated by periods of delay, procedural wrangling, and attempts at commercial resolution.

[24] Primall is correct that settlement or mediation discussions do not relieve a claimant of the duty to prosecute its case. A litigant cannot simply place a matter on hold for years and later seek to excuse the delay on the basis that negotiations were ongoing in parallel. If anything, the claimant must decide whether to pursue settlement while keeping the matter procedurally alive, or to risk the consequences of delay.

[25] But the fact that the negotiations do not excuse delay does not render them irrelevant. They remain part of the facts to consider when deciding whether this is a case of inexcusable inactivity of the kind seen in the more extreme authorities. Here, they help explain why the matter did not move more quickly, even if they do not fully justify that state of affairs.

[26] On the chronology before me, there is no definite point at which Primall could conclude that iPoint was no longer pursuing the counterclaim, however drawn out it might be. There is no obvious point at which the counterclaim can objectively be said to have been abandoned. Instead, the record reflects continued, if inadequate, activity over time.

[27] Primall placed considerable emphasis on the proposition that, once its own claim had become moot in 2013, iPoint alone bore the burden of prosecuting the only live claim in the matter. That submission has force. iPoint was indeed dominus litis in respect of the counterclaim and could not shift the primary duty of prosecution onto Primall.

[28] That, however, does not mean that Primall's conduct is irrelevant. The authorities recognise that a court may consider whether the party seeking dismissal used the procedural tools available to it. In this matter, Primall took various procedural points and delivered special pleas. Still, it did not itself bring the special pleas to determination, nor did it seek to drive the matter to trial once pleadings had closed. The January 2025 case management minute also reflects both parties' acceptance

that the matter remained alive, that there would be a further pre-trial process, and that prejudice and possible amendment would be discussed in that process.

[29] This does not make Primall responsible for the delay. However, it reinforces the conclusion that the history of this case is more complex than a simple case in which one party does nothing while the other waits helplessly for years.

[30] Primall's case rests on prejudice. It says that the business relevant to the dispute was sold in 2018; that the devices are no longer available because they were used for spare parts, disposed of, or otherwise no longer exist in an inspectable form; that key witnesses have left, are unwilling to assist, or have no reliable recollection; and that it is therefore no longer possible for it to meet the counterclaim fairly at trial.

[31] These are serious concerns that cannot be brushed aside lightly. In particular, the disappearance of the devices may materially affect either party's ability to litigate issues concerning their condition, repairability, residual life, and value. Primall's complaint that a subpoena cannot restore memory, cooperation, or timely consultation is also plainly correct.

[32] The difficulty for Primall is that it seeks dismissal of the entire counterclaim. On the papers before me, the prejudice shown does not establish that every component of the counterclaim is incapable of fair adjudication.

[33] One must distinguish between at least two periods and two categories of issues. The first covers the period from 2013 until the 2019 tender, during which iPoint's case was simply that Primall was obliged, on termination, to make devices available and failed to do so. That issue has been in the case from the start. Primall's own 2020 plea confirms that no tender was made until 2019. The second concerns the post-2019 issue: whether the 2019 tender constituted compliance, and, if not, whether the devices' condition rendered the tender inadequate.

[34] The second issue raises more acute concerns about prejudice because the devices no longer exist, and evidence of their condition in 2019 may now be harder to

obtain. But that does not automatically render the whole counterclaim, including the pre-2019 non-delivery case, trial-unworthy.

[35] There is also force in iPoint's submission that Primall's prejudice case is incomplete in one important respect. When Primall amended its plea in 2020 to rely on the 2019 tender, someone must have furnished instructions about that tender, the devices tendered, and their whereabouts and condition. Primall identified certain witnesses said to be unavailable or uncooperative, but it did not identify the person or persons who furnished the factual material for the 2020 amendment, nor did it explain why those persons could no longer assist.

[36] I accept that faded recollection, unavailable devices and changed personnel create real prejudice. But prejudice of that kind does not automatically justify dismissal. The question is whether the prejudice is so profound that a fair trial is no longer possible. On the present affidavits, and having regard to the history as a whole, that threshold has not been crossed.

[37] This is therefore not one of the rare cases in which the Court should exercise its inherent power to dismiss the counterclaim without a trial. The application for dismissal must fail.

Amendment application

[38] Primall submitted that the amendment application is not properly before me because the notice of intention to amend lapsed when iPoint failed to launch the rule 28(4) application within the prescribed period after objection. Primall relied heavily on *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin*,⁶ where it was held that a notice to amend had lapsed because amended pages were not delivered within the time permitted by Rule 28(5) and (7), with the result that "there was no extant notice of intention to amend" capable of causing prejudice. That judgment also emphasised, however, that less-than-perfect procedural steps must be assessed through the lenses

⁶ 2024 (1) SA 272 (GJ).

of prejudice and the interests of justice, and that the Rules are not to be applied "rigidly, inflexibly or without due regard to the exigencies of a particular case".

[39] There is force in that submission. iPoint did not comply with the time period contemplated by Rule 28(4) and did not file a formal application for condonation. Primall was entitled to raise that defect and did so clearly in both its papers and its oral argument.

[40] It is not necessary, however, to decide the amendment application solely on that procedural basis. Even if it is assumed, without deciding, that the lateness could be condoned and that the Court should proceed to the merits, the amendment in its present form cannot be granted.

General principles

[41] The principles governing amendments are well established. Amendments should generally be allowed so that the real issues between the parties may be properly ventilated, unless the amendment is mala fide or would cause injustice that a costs order, postponement or suitable directions cannot cure. The mere fact that an amendment is sought late is not, without more, decisive.

[42] At the same time, an amendment must produce a coherent and triable pleading. The court does not ask whether the amended case will succeed. It asks whether the amended case is properly pleaded and whether the other party can fairly be required to plead to it.

Merits of the proposed amendment

[43] A substantial feature of the proposed amendment is its response to Primall's 2019 tender. iPoint says that the devices tendered by Primall were in disrepair, outdated, or otherwise incapable of serving their intended purpose, and that the tender therefore did not constitute proper compliance with Primall's contractual obligations under clause 15.3 of the Licence Agreement.

[44] In principle, iPoint is entitled to plead a response to a defence raised by Primall. It is also entitled, within limits, to update the quantification of a damages claim as litigation proceeds. In that sense, not every complaint Primall has advanced against the amendment is well-founded.

[45] The problem is the way the amendment is formulated. Primall is correct to submit that a case based on non-delivery or refusal to deliver is not the same as a case based on defective delivery. They depend on different factual allegations. If iPoint wishes to say that the 2019 tender was not compliant because the devices were defective, it must plead the material facts supporting that conclusion with sufficient clarity. Broad allegations of disrepair or unusability, without more, do not adequately identify the case Primall must meet.

[46] This does not require iPoint to plead all its evidence, but it must plead more than a conclusion. An expert notice cannot substitute for a properly pleaded cause of action. Expert opinion may support pleaded facts; it cannot introduce them.

[47] Primall is also correct that the proposed amendment's structure is problematic. During argument, it pointed out that some parts of claim B are proposed for deletion, while other paragraphs dependent on that structure are retained; that the proposed amendment to claim C introduces a revised damages model and some 56 devices without clear reconciliation with the existing allegations; and that the proposed new paragraph 19.4 does not sit coherently with the retained paragraphs 19.3 and 19.5.

[48] The latter letter from iPoint's attorneys, proposing further textual adjustments, reinforces rather than resolves the difficulty. It suggests that the amendment before the Court was still being reformulated. A court should be slow to grant leave to amend where the proposed amendment is not yet settled and coherent.

[49] There is also a prejudice dimension. Because the devices no longer exist, a late shift to a defective-delivery case further complicates the practical difficulty of meeting it. That does not mean such a case can never be pleaded. It does mean that, if it is to be pleaded after so much time has passed, it must at least be pleaded clearly and coherently. The present formulation does not achieve that.

[50] For those reasons, even assuming, in iPoint's favour, that the procedural defect could be condoned, the amendment should be refused on its merits. The Court therefore does not find it necessary to decide whether condonation should formally be granted. For present purposes, that question is neither here nor there, because even on the assumption that condonation were available, the proposed amendment does not disclose a coherent case fit for amendment.

Costs

[51] The dismissal application raised substantial issues of fact, procedure and fairness. It fails, and Primall must bear the costs occasioned by it. The amendment application was opposed on both procedural and substantive grounds. iPoint does not obtain leave to amend and must bear the costs of that application. Primall's employment of two counsel was justified due to the long and complex procedural history and complex factual matrix.

Order

[52] The following order is made:

1. The plaintiff's application to dismiss the first defendant's counterclaim is dismissed with costs to be taxed on scale B.
2. The first defendant's application for leave to amend its counterclaim is dismissed with costs to be taxed on scale B, including the costs of two counsel where so employed.


WJ du Plessis

Judge of the High Court, Gauteng Division,
Johannesburg

Date of hearing: 10 February 2026

Date of judgment: 22 April 2026

For the plaintiff (Primall Media): G Wickings SC and LVR van Tonder
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For the first defendants (iPoint
Marketing):

AC Oosthuizen SC instructed by Teresa
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