

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(LIMPOPO DIVISION, POLOKWANE)

CASE No: HCA 52/2024  
HCA 53/2024

|                                                                                   |                                             |
|-----------------------------------------------------------------------------------|---------------------------------------------|
| (1)                                                                               | <u>REPORTABLE: YES/NO</u> NO                |
| (2)                                                                               | <u>OF INTEREST TO THE JUDGES: YES/NO</u> no |
| (3)                                                                               | <u>REVISED: YES/NO</u> no                   |
| DIAMOND AJ                                                                        |                                             |
|  | 17/02/2026                                  |
| SIGNATURE                                                                         | DATE                                        |

In the matter between:

JOHAN SCHOEMAN.N.O. AO

APPELLANT  
(HCA 52/2014)

MOLANI BOERDERY (PTY) LTD

APPELLANT  
(HCA 53/2014)

and

PUSELA IRRIGATION BOARD

RESPONDENT

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JUDGMENT

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**DIAMOND A J:**

- [1] This is an appeal against the judgment and order of the Additional Magistrate, Tzaneen, delivered on 8 October 2024, refusing the Appellant's application for leave to amend its plea and dismissing that application with costs.
- [2] The magistrate recorded at the outset of his judgment that, for practical purposes and the sake of convenience, case numbers 1612/2023 and 1613/2023 in the Tzaneen Magistrates' Court would be heard together, and that the outcome in case 1612/2023 would determine the outcome in case 1613/2023. The same position obtains on appeal. The Respondent, Pusela Irrigation Board, instituted separate actions against different defendants, but in each action the defendants advanced identical defences and the same legal issues arise. Those actions have given rise to two appeal matters in this Court, namely case numbers HCA 53/2024 (arising from case 1612/2023) and HCA 52/2024 (arising from case 1613/2023). Given the complete overlap in issues, it is neither necessary nor desirable to deliver two separate reasoned judgments. This judgment is therefore handed down under both case numbers HCA 53/2024.

- [3] The appeal raises a narrow but important procedural question: whether, in the circumstances of this case, the magistrate was correct to refuse an amendment on the footing that the proposed defence was “excipiable” and “bad in law” because of the magistrate’s interpretation of section 98 of the National Water Act 36 of 1998 (“the NWA”).
- [4] The question is complicated by the fact that the legal issue underpinning the proposed amendment has been considered, though not entirely exhausted, in earlier decisions of the Supreme Court of Appeal and of this Division. These include *S v Mostert and Another*<sup>1</sup> and *Crocodile River West Irrigation Board v Allies Farms SA (Pty) Ltd*<sup>2</sup>.
- [5] The appeal thus sits at the intersection of two bodies of doctrine: the law of amendments of pleadings in the magistrates’ courts, and the transitional regime regulating irrigation boards under section 98 of the NWA.

## **OUTLINE OF THE PLEADINGS AND THE ATTEMPTED AMENDMENT**

### **THE SUMMONS AND PARTICULARS OF CLAIM**

- [6] The Respondent, Pusela Irrigation Board (“Pusela”), instituted action in the magistrates’ court against the Appellant, Molani

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<sup>1</sup> 2010 (2) SA 586 (SCA).

<sup>2</sup> (4389/2019) ZALMPPHC 63.

Boerdery (Pty) Ltd ("*Molani*"), under case number 1612/2023. The claim is for levies allegedly due in respect of water allocated to two agricultural portions (Portion 190 and Portion 191 of the Farm Pusela 555 LT) within the irrigation district administered by Pusela.

[7] In the summons and particulars of claim, Pusela pleads in essence that:

- It is an irrigation board responsible for water allocation and levies within its jurisdiction.
- Water has been allocated to the Appellant's farms and levies have been raised in respect of specified periods.
- The Appellant has failed to pay certain levies, resulting in an alleged outstanding balance, for which Pusela sues, together with interest and costs.

#### THE ORIGINAL PLEA

[8] Molani delivered its original plea on 1 November 2023. In that plea it raises, *inter alia*, a defence directed at Pusela's authority and standing under the NWA. The key passages are paragraphs 1.3 and 1.4, which the Appellant's heads of argument quote and rely upon:

- Paragraph 15 referring to paragraphs 1.3 and 1.4 of the plea that Pusela “can only properly function as a water user association and that it was obligated to, in terms of section 98(4) of the National Water Act, have applied to the Minister for its conversion from an irrigation board to a water user association, which application must have been lodged within six months from the commencement of the Water Act.”
- Paragraph 1.4 pleads that “the establishment of the plaintiff is not catered for in the Water Act, nor is any right of the plaintiff to charge consumers levies, in the instance of an irrigation board, catered for in the Water Act as read with the Water Services Act.”

[9] On the strength of these allegations, the original plea already put in issue whether Pusela, as an irrigation board that has not transformed into a water user association, has lawful authority under the NWA to levy charges and to sue for their recovery.

[10] It is common cause that Pusela did not bring an exception to the original plea. No application was made to strike out these paragraphs as vague, embarrassing, or bad in law. The action was joined on the basis that these defences, at least textually, stood as pleaded.

NOTICE OF INTENTION TO AMEND AND PROPOSED  
AMENDMENTS

[11] On 3 June 2024, Molani delivered a notice of intention to amend its plea in terms of Rule 55A(1) and (2) of the Magistrates' Courts Rules. The notice is contained at pages 14–17 of the appeal record.

[12] The proposed amendment leaves the essential section 98(4) defence intact but seeks to “clarify and elaborate” its legal consequences by inserting new paragraphs 1.4 to 1.8, and by renumbering certain existing paragraphs. In substance, the amendments:

- Plead expressly that section 98(4) of the NWA is peremptory, using the mandatory “must”.
- Plead that non-compliance with section 98(4) – i.e. failure to submit the required transformation proposal within six months of the commencement of the NWA – has the legal consequence that Pusela loses its powers, duties and functions as an irrigation board under the NWA.
- Plead, more specifically, that by virtue of the “subject to subsection (4)” wording in section 98(3), the board’s previously existing powers and duties can only continue if it has complied with section 98(4); absent such

compliance, section 98(3)(a) and (b) fall away and the board is left without operative authority to levy charges or sue.

[13] In short, the amendment does not introduce a wholly new line of defence. It takes the existing contention – that Pusela failed to comply with section 98(4) – and articulates more fully what the Appellant alleges the legal consequences of that non-compliance are.

#### THE OBJECTION AND APPLICATION FOR LEAVE TO AMEND

[14] On 10 June 2024 Pusela delivered a notice of objection to the intended amendment, contending that the amendment would render the plea excipiable and that the automatic loss of powers theory is bad in law, being inconsistent with section 98(2) and (3) of the NWA and with case law on the continued existence and powers of irrigation boards.

[15] In consequence of the objection, Molani launched a formal application for leave to amend, supported by the founding affidavit of its attorney, Mr Erasmus. That application came before the Additional Magistrate, Tzaneen, on 23 August 2024 and was argued by counsel for both parties.

**STATUTORY CONTEXT: SECTION 98 OF THE NATIONAL  
WATER ACT**

[16] The dispute, both in the court a quo and on appeal, centres on the proper interpretation of section 98 of the NWA and, in particular, on the legal consequences of non-compliance with section 98(4). It is therefore necessary to set out the relevant subsections.

[17] Section 98(2) provides:

*"A board continues to exist until it is declared to be a water user association in terms of subsection (6) or until it is disestablished in terms of the law by or under which it was established, which law must, for the purpose of such disestablishment, be regarded as not having been repealed by this Act."*

[18] Section 98(3) provides, in relevant part:

*"Subject to subsection (4)—*

*(a) the name, area of operation, management, property, rights, liabilities, obligations, powers and duties of a board remain the same as immediately before the commencement of this Act; and*

*(b) this section does not affect the continuity, status, operation or effect of any act or omission of a board, or of any by-law made by a board, before the commencement of this Act."*

[19] Section 98(4) provides:

*"Within six months of the commencement of this Act, a board must prepare and submit to the Minister a proposal, prepared according to section 91, to transform the board into a water user association."*

[20] Section 98(5) empowers the Minister to accept, amend or reject the transformation proposal; section 98(6) deals with the declaration of a water user association.

[21] There is no express provision in section 98 that states what the consequences are if a board fails to comply with section 98(4), either by not submitting a proposal at all or by submitting one late. The section also contains no explicit sanction – such as automatic disestablishment – for non-compliance.

[22] Two judgments are critical to understanding how section 98 has been interpreted to date.

#### S V MOSTERT AND ANOTHER<sup>3</sup>

[23] In *Mostert* the Supreme Court of Appeal had to determine, in a criminal prosecution for unlawful abstraction of water, whether an irrigation board established under the Water Act 54 of 1956 continued to exist and to exercise its powers after the NWA came into operation, and whether section 151 of the NWA applied within the board's irrigation district.

[24] The Court set out section 98(2) and described it as a “sunset clause”:

“Section 98(2) of the 1998 Act is a ‘sunset clause’. It provides:

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<sup>3</sup> 2010 (2) SA 586 (SCA). ( “*Mostert*”).

*'A board continues to exist until it is declared to be a water user association in terms of subsection (6) or until it is disestablished in terms of the law by or under which it was established, which law must, for the purpose of such disestablishment, be regarded as not having been repealed by this Act.'*" (para 12).

[25] The Court further referred to section 98(3) and concluded:

*"The clear intention of these provisions is that existing water irrigation boards should continue in operation until they are restructured as water user associations. (Although strictly speaking it should not be taken into account in interpreting the Act, this is confirmed by the explanatory note to Ch 8 of the Act, into which s 98 falls.)"* (para 12).

[26] Importantly, the SCA noted that the board in question had not transformed within the six-month period:

*"Notwithstanding the six-month period prescribed by s 98(4), the complainant was neither disestablished nor transformed into a water user association, and was still continuing to operate by virtue of the provisions of s 98(2) and (3) at the time of the Appellants' trial, some eight years after the 1998 Act had come into operation. How this somewhat surprising state of affairs came about is, however, neither here nor there and, for present purposes, it must be accepted that at all times material to the charges brought against the Appellants the complainant had continued to exist and to operate with the obligations, powers and duties it had enjoyed under the 1956 Act."* (para 13, emphasis added)."

[27] The SCA held that the complainant irrigation board continued to exist and to operate with its powers and duties under the NWA, notwithstanding non-compliance with section 98(4), and that the criminal provisions of the NWA applied in its district

CROCODILE RIVER WEST IRRIGATION BOARD V ALLIED  
FARMS SA (PTY) LTD AND ANOTHER<sup>4</sup>

[28] In *Crocodile River West*, Makgoba JP in this Division considered a civil dispute about the validity of charges levied by the Crocodile River West Irrigation Board. Among the defences raised was that the board had no authority post-NWA to levy such charges.

[29] After setting out the historical legislative chain and section 98 of the NWA, the Court held:

*“The clear intention of the provisions of section 98 of the NWA is that the existing water irrigation boards should continue in operation until they are restructured as water user associations.”*<sup>5</sup>

*By virtue of section 98(2) of the NWA, and subject to section 98(4) of the NWA, the plaintiff continues to exist as an irrigation board until it is declared to be a water user association in terms of section 98(6) of the NWA, or until it is disestablished in terms of the repealed Water Act, which, for the purposes of such disestablishment, is regarded as not having been repealed by the NWA.”*<sup>6</sup>

[30] Makgoba JP emphasised the continuity of powers and duties:

*“The name, area of operation, management, property, rights, liabilities, obligations, powers and duties of the plaintiff remain the same as immediately before the commencement of the National Water Act. In terms of section 98(3)(b) of the NWA the provisions of section 98 of the NWA do not affect the continuity, status, operation or effect of any act or omission of the plaintiff,*

<sup>4</sup> (4389/2019) ZALMPPHC 63 (29 November 2022) (Limpopo Division, Polokwane, per Makgoba JP). (“*Crocodile River West*”)

<sup>5</sup> Par. 26

<sup>6</sup> Par 27.

or any bylaw made by the plaintiff, before the commencement of the NWA."<sup>7</sup>

*The plaintiff's rights, liabilities, obligations, powers and duties under the repealed Water Act and the Regulations promulgated thereunder, remain in place until such time as the plaintiff is disestablished or transformed to a water user association."*<sup>8</sup>

- [31] The Court concluded that section 98 was inserted precisely to prevent a gap in liability and governance:

*"I agree with the submission made by Counsel for the Plaintiff that section 98 of the NWA was inserted to prevent a situation where water users in an irrigation district could escape liability for water use charges and other charges in sections 57 (1) and 57 (2) of the NWA until such time as the irrigation board within whose district they fall, has been either converted to, or replaced by a water user association.*

*It was also inserted to protect the existing infrastructure within such an irrigation district and to ensure a smooth transition in the new order.*

*The First Defendant's interpretation of the provisions of the NWA would create the absurd situation that water users within the irrigation board's area of jurisdiction would in the interim period be entitled to free water. This is the very situation that section 98 of the NWA seeks to prevent.*

*It is trite law that a statute must be interpreted in such a way that it will not have absurd consequences.*

*A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results."*<sup>9</sup>

- [32] In *Crocodile River West*, the plaintiff board had in fact submitted an application under section 98(4), and the transformation

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<sup>7</sup> Par 30.

<sup>8</sup> Par 31.

<sup>9</sup> Pars 33 – 35.

process was pending. The Court therefore dealt with a situation of delayed transformation, not of complete inaction.

## **THE MAGISTRATE'S JUDGMENT AND THE PARTIES' ARGUMENT**

### **THE MAGISTRATE'S JUDGMENT**

[33] The magistrate's written judgment runs from pages 42–49 of the appeal record.

[34] He recorded that the Respondent (plaintiff) had instituted action for outstanding levies; that the applicant (defendant) wished to amend its plea to raise a section 98(4) defence; and that the Respondent objected on the basis that the plea, if amended, would be excipiable and that the defence was bad in law.

[35] The magistrate summarised the arguments of the parties, noting that:

- The applicant submitted that section 98(4) is peremptory and that the NWA is silent on the consequences of non-compliance, leaving a "novel" question of statutory interpretation that should be ventilated.
- The Respondent submitted that the intended amendment is excipiable and should not be allowed; it relied on the wording of section 98(2) and on authorities

such as *De Klerk v Du Plessis*<sup>10</sup> and *Nxumalo v First Link Insurance Brokers (Pty) Ltd*<sup>11</sup> to the effect that amendments which will render a pleading excipiable ought not to be permitted.

[36] The magistrate then undertook a textual analysis of section 98(2) – (4), quoting those subsections and canvassing the parties' opposing interpretations.

[37] At the heart of the judgment is the following passage, quoted by the Appellant in its heads:

*"However, the court finds it very confusing to interpret. If the circumstances in S98(3)(a) and (3)(b) is no longer the same due to non compliance with S98(4) what is the effect thereof. The Act is silent on this aspect and open to interpretation. The legislature did not expressly mention that the irrigation board will cease to exist and will be divested of its power, duties and functions for failure to comply with S98(4). The Act is vague with regard to this issue. The NWA of 1998 also makes no provision for any disestablishment of an irrigation board.*

*The court cannot assume, speculate or make any inferences of the legislatures intention. The court cannot come to a conclusion based on assumptions and inferences which are not clear in the Act.*

*The court finds it indeed very strange that the legislature did not enact a specific clause to state what the consequences would be for failure to comply with S98(4). This was not a difficult task to do and it would have prevented us from being in the predicament we are presently facing. It created uncertainty for all concerned."*

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<sup>10</sup> 1995 (2) SA 40 (T). ("*de Klerk*")

<sup>11</sup> 2003 (2) SA 620 (T). ("*Nxumalo*")

[38] Having thus characterised the statute as silent and vague, the magistrate nevertheless concluded:

- That the applicant's intended amendment is excipiable, that the proposed defence is bad in law, and that there is no defence disclosed;
- That the application for leave to amend should therefore be dismissed with costs.

#### ARGUMENTS FOR THE APPELLANT

[39] In this Court, the Appellant's main submissions can be summarised as follows:

- The proposed amendment merely amplifies a defence already pleaded in the original plea and not attacked by exception. Paragraphs 1.3 and 1.4 of the original plea already raised non-compliance with section 98(4) and questioned Pusela's authority; the amendment does no more than make the consequences of that non-compliance explicit.
- Under *Moolman v Estate Moolman*<sup>12</sup> and the general principles governing amendments, the question is whether the amendment raises a triable issue, not

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<sup>12</sup> 1927 CPD 27. ("*Moolman*")

whether the defence is likely ultimately to succeed. Watermeyer J's well-known formulation – that amendments will “always be allowed” unless mala fide or causing irremediable prejudice – remains the starting point.

- The magistrate misdirected himself by conflating the test for exception with the test for amendment. He acknowledged statutory ambiguity and then paradoxically held that a pleading articulating one possible interpretation is vague and excipiable. That internal inconsistency shows that he approached the matter as if deciding the ultimate merits, rather than asking whether the defence is manifestly hopeless.
- The legal issue raised is a bona fide and substantial one: whether an irrigation board that has never complied with section 98(4) – despite a peremptory duty to do so within six months of the NWA's commencement – may, decades later, continue to exercise full charging powers as if it were operating under the old 1956 regime. That issue, the Appellant says, goes to the heart of Pusela's locus standi and authority and should not be foreclosed at the pleading stage.

- The Appellant accepts the existence and relevance of *Mostert* and *Crocodile River West* but contends that they do not conclusively decide the consequences of prolonged total non-compliance with section 98(4); rather, they address the continuity of boards in an “interim” context, where transformation has been engaged or where the purpose is to avoid a regulatory vacuum.
- Any prejudice to Pusela can be cured by costs and, if necessary, procedural directions; the refusal of the amendment, by contrast, shuts out a central defence without trial.

#### ARGUMENTS FOR THE RESPONDENT

[40] The Respondent (in this appeal), in detailed and careful heads, accepts the general principle that amendments are ordinarily to be allowed but emphasises the jurisprudence which holds that amendments introducing a clearly excipiable pleading should be refused.

[41] It relies on authorities such as *De Klerk*, *Nxumalo* and *Krischke v Road Accident Fund*<sup>13</sup>, and others, as well as the

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<sup>13</sup> 2004 (4) SA 358 (W).

commentary in Erasmus: Superior Court Practice, for the propositions that:

- Where an amendment will render a pleading excipiable, the court should generally refuse leave to amend.
- Where the objection to an amendment is that the resulting pleading will be excipiable, the court hearing the amendment should decide the question of excipiability as a matter of law, rather than postponing the issue to a later exception.

[42] The Respondent further submits that the proposed amendment is not a mere amplification but introduces a qualitatively new defence: an “*automatic loss of powers theory*”, i.e. that failure to submit a proposal under section 98(4) results in the board automatically losing all its powers, duties and functions under the NWA.

[43] On the merits of section 98, the Respondent contends that this theory is untenable in light of:

- The plain language of section 98(2) and (3), which preserves the board’s existence and powers until declared a water user association or disestablished under the old law.

- The line of authority represented by *Mostert* and *Crocodile River West*, which affirm the continued existence and operative powers of irrigation boards under section 98, even years after the six-month period.

[44] The Respondent quotes extensively from *Mostert*:

*"Notwithstanding the six-month period prescribed by s 98(4), the complainant was neither disestablished nor transformed into a water user association, and was still continuing to operate by virtue of the provisions of s 98(2) and (3) at the time of the Appellants' trial, some eight years after the 1998 Act had come into operation.... it must be accepted that at all times material to the charges brought against the Appellants the complainant had continued to exist and to operate with the obligations, powers and duties it had enjoyed under the 1956 Act."*<sup>14</sup>

[45] It similarly relies on Makgoba JP's statements in *Crocodile River West* that the board's "rights, liabilities, obligations, powers and duties ... remain in place until such time as the plaintiff is disestablished or transformed to a water user association" and that section 98 was intended to prevent "free water" in the interim.

[46] On that basis, the Respondent submits that the Appellant's defence is squarely inconsistent with binding SCA authority and with the approach of this Division and is therefore bad in law. It contends that, once the defence is seen as fundamentally untenable, the magistrate was correct to refuse an amendment

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<sup>14</sup> Par.13.

that would serve only to introduce an excipiable pleading and precipitate an inevitable exception.

### **ISSUES ON APPEAL**

[47] The following issues arise for determination:

- Whether the magistrate's order refusing the amendment is appealable, given that it is interlocutory in form.
- If so, whether the magistrate misdirected himself in refusing the amendment on the basis that the proposed defence is excipiable and "bad in law".

[48] It is important to emphasise that this Court is not called upon at this stage to decide finally whether the Appellant's construction of section 98 is correct. The question is whether that construction is so clearly untenable that it should not be allowed even to be pleaded.

### **APPEALABILITY**

[49] The general principles governing the appealability of interlocutory orders are well known and need only be restated briefly. In *Zweni v Minister of Law and Order*<sup>15</sup> Harms AJA held that, as a rule, a judgment or order is appealable if it has three attributes: it is final in effect; it is definitive of the rights of the

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<sup>15</sup> 1993 (1) SA 523 (A).

parties; and it disposes of at least a substantial portion of the relief claimed in the main proceedings.

[50] Subsequent jurisprudence<sup>16</sup> has recognised that these attributes are not exhaustive or rigid, but they remain central. The Supreme Court of Appeal has also warned, in more recent decisions, against lower courts using an open-ended “interests of justice” standard outside the constitutional context as a free-standing basis for appealability, stressing that finality and avoidance of piecemeal appeals remain important policy considerations.

[51] In *TWK Unterhalter AJA*:

- Re-centred Zweni as the primary test for appealability.
- Held that adopting “interests of justice” as the foundational criterion for appealability in the SCA would create an “unpredictable and open-ended” regime and that the doctrine of finality must remain the central principle in determining appealability.<sup>17</sup>

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<sup>16</sup> *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* ZASCA 63 (“*TWK*”); 2023 (5) SA 163 (SCA and H J v P J (285/2023) ZASCA 55 (19 April 2024).

<sup>17</sup> Par 30.

[52] A further remark by UNTERHALTER AJA in *TWK* which is in my view is relevant in this appeal under consideration is the following:

*“Even if this is so as a matter of principle, as the defendant's Counsel reminded us, a number of decisions of this Court have been willing, with different degrees of separation, to part from Zweni, or subsume Zweni under the capacious remit of the interests of justice. I do not here essay a general account of appealability. I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court. Different types of matters arising from the High Court may (I put it no higher normatively) warrant some measure of appreciation that goes beyond Zweni or may require an exception to its precepts. Any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law. Recent decisions of this Court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of Zweni”.*<sup>18</sup>

[53] I understand the above-mentioned remark from *TWK* as follows:

- Some previous judgments have treated “interests of justice” as a general appealability test, but that approach is not the correct baseline for the Supreme Court of appeal – and for that matter also for High Courts to determine whether a judgment is appealable to it.

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<sup>18</sup> (Emphasis added.) In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd NNO and Others* the Supreme Court of Appeal draws a clear distinction between the test for appealability to the Constitutional Court and the test for appealability to the High Courts and the Supreme Court of Appeal. In essence, it holds that the Constitutional Court's formulation – that interlocutory decisions are appealable if it is in the interests of justice – is a standard that applies specifically to the Constitutional Court. See in particular paragraphs 26 and 27 of that judgment.

- Going forward, finality under Zweni is central; only carefully defined, exceptional categories may depart from it, and any such departure must be clearly justified and consistent with the rule of law.

[54] It is further important to note that in the case of *TWK* both parties tried to persuade the Supreme Court of Appeal to hear the appeal in the interest of justice in order to bring the disputes between the parties to an end. This invitation, the Supreme Court of Appeal declined and said that the matter was simply not appealable, and leave to appeal was consequently refused, and the appeal was struck from the roll.

[55] In the appeal under consideration, the same request from both parties was directed to the court, that is, to hear the appeal in under the broad rubric of the interest of justice.

[56] The order under appeal is, in form, interlocutory: it is an order refusing an amendment and does not, by itself, dispose of the action.

[57] Our question to counsel for the Appellant in court was whether it would be possible to argue the essence of the amendment that was refused by the magistrate in any event at the end of the trial stage because it raises purely a question of law.

[58] Counsel conceded in court that it would be possible to do so, but did not take the issue any further by further submissions.

[59] There is, in my view, an answer to the suggestion that the Appellant can simply raise the same point as a matter of law at the end of the trial. On a proper reading of the proposed amendment, the section 98 defence is not a free-standing abstract proposition of law divorced from factual context. It is a mixed question of law and fact. The Appellant wishes to plead, and then prove, factual allegations concerning the Respondent's status, its historic establishment, its failure to submit any proposal in terms of section 98(4), and the period over which that failure persisted. On those pleaded facts, it then invites the court to draw legal conclusions as to the Respondent's authority and powers under the NWA.

[60] If the amendment is refused, the factual foundation for that mixed law-and-fact enquiry is not properly laid in the pleadings. The Appellant is constrained to litigate on a narrower factual and legal footing than it contends for. In such circumstances it is not realistic to say that the entire defence can simply be resurrected later as a "pure" point of law. The refusal of the amendment prevents the Appellant from placing its full factual case on record in support of its legal contention and thereby affects the shape and conduct of the trial in a way that is, for all practical purposes, final.

[61] In my view, there are certain further considerations to be taken into account.

[62] The effect of the order is to preclude the Appellant from raising, in the magistrates' court, a central statutory defence concerning the Respondent's authority and standing. It fixes, for the purposes of that court, the permissible scope of the plea.

[63] The effect is final in relation to that defence: the Appellant cannot, without leaving the magistrate's court, introduce a pleading that articulates its "automatic loss of powers" contention under section 98(4).

[64] Given the nature of the Respondent's claim – for levies dependent on the legal authority of the board – the refusal of the amendment goes to a substantial component of the relief in issue. It directly affects the Appellant's ability to contest liability on the basis that the plaintiff lacked lawful authority to charge and sue.

[65] In these circumstances, I am satisfied that the order bears the required attributes of finality in respect of a substantial defence and is therefore appealable within the Zweni framework. It is not a mere case-management direction or procedural convenience; it determines, for all practical purposes in the court a quo, whether a core defence may be advanced

## PRINCIPLES GOVERNING AMENDMENTS OF PLEADINGS

[66] The basic principles governing the amendments of pleadings, are not in dispute. In *Moolman*, Watermeyer J stated:

*"The question of amendment of pleadings has been considered in a number of English cases... and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."*

[67] This formulation has been cited with approval in our courts for nearly a century and reflects the general generosity with which amendments are approached. The Constitutional Court has endorsed the principle that amendments should ordinarily be allowed where they serve to ventilate the real issues between the parties, subject to considerations of mala fides and non-curable prejudice.

[68] It is also well accepted that an amendment will not be permitted where the proposed pleading is clearly bad in law – that is, where, even if all facts alleged are proved, the claim or defence would still not be sustainable. This is the line of authority on which the Respondent relies, including *De Klerk v Du Plessis*, *Nxumalo*, *Krischke* and others.

[69] In *De Klerk*, Van Dijkhorst J said (at 43I–44A):

*"An amendment which would render a pleading excipiable should not be allowed. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare for another battle on exception on the same point."*

[70] A similar approach was taken in *Nxumalo*<sup>19</sup>, where the court held that, where an amendment is opposed on the ground that it would render the pleading excipiable, both the application for amendment and the notice of objection based on exception should be heard simultaneously and the court should determine the issue there and then.

[71] These cases do not detract from the general permissive approach to amendments; rather, they recognise that there is no point in permitting an amendment that is clearly doomed, thereby forcing the parties into unnecessary exception proceedings and wasting costs.

[72] The real difficulty lies in determining when a proposed pleading is clearly bad in law and when it raises a genuinely debatable point which, though perhaps weak, should be allowed to tested at a trial. That is a judgment call requiring careful attention to the state of the law and to the specific facts.

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<sup>19</sup> 2003 (2) SA 620 (T).

**EVALUATION: WAS THE MAGISTRATE CORRECT TO REFUSE  
THE AMENDMENT?**

**THE MAGISTRATE'S REASONING**

[73] In my view, the magistrate misdirected himself in the way he approached the question.

[74] He expressly recorded that the NWA is silent" on the consequences of non-compliance with section 98(4), that it is open to interpretation, and that the legislature's intention is not clearly expressed. He described it as very strange that the legislature did not spell out the consequences and concluded that this omission created uncertainty for all concerned.

[75] Those statements amount to an acknowledgement that the legal question under section 98 is not straightforward; that the text does not conclusively indicate one answer; and that there is room for interpretive argument.

[76] Yet the magistrate then held that the Appellant's proposed articulation of the consequences of non-compliance – that the board loses its powers, duties and functions – is vague and excipiable and discloses no defence. He did so without engaging with the distinction between the existence of the board under section 98(2) and the extent of its powers and duties under section 98(3) read with subsection (4); and without

analysing whether the Appellant's view, though contestable, is necessarily untenable.

[77] The effect is that the magistrate treated the difficulty of the interpretive question as a reason to exclude the defence from being pleaded, rather than as a reason to recognise it as a triable issue. That reverses the logic of the Moolman approach and of the constitutional preference for deciding disputes on their merits.

#### THE IMPACT OF *MOSTERT* AND *CROCODILE RIVER WEST*

[78] It is true that *Mostert* and *Crocodile River West* provide important context and that any court faced with an automatic loss of powers theory must grapple with them.

[79] *Mostert* is binding authority of the Supreme Court of Appeal that, notwithstanding non-compliance with section 98(4), an irrigation board established under the 1956 Act continues to exist and to operate with the powers and duties it previously enjoyed, at least for purposes of applying the criminal provisions of the NWA.

[80] *Crocodile River West*, in turn, is persuasive – and for this Division particularly influential – authority that, where a board has complied with section 98(4) by submitting a transformation proposal and has not yet been transformed or disestablished,

its rights, obligations, powers and duties remain in place until such time as transformation or disestablishment occurs.

[81] These authorities significantly constrain the Appellant's position. They make it difficult, to sustain a blanket submission that any non-compliance with section 98(4) automatically extinguishes a board's powers and duties in every respect and for all purposes.

[82] But it does not follow that they answer exhaustively all questions that may arise from prolonged non-compliance by a particular board over a particular period; nor do they necessarily preclude a court from considering whether there may be nuanced consequences, whether grounded in interpretation, constitutional legality, or remedial discretion, for decades-long failure to initiate the transformation process.

[83] The Appellant's amendment, in its current form, undoubtedly adopts a maximalist position: it pleads that Pusela has no powers, duties and/or functions under the NWA because it failed to comply with section 98(4). The Respondent rightly criticises this as a far-reaching proposition, apparently inconsistent with *Mostert's* recognition that boards continued to exist and to operate with their powers and duties eight years after the NWA's commencement.

[84] Yet the task of this Court is not to decide whether the Appellant's theory will ultimately withstand exception or the scrutiny of trial. The task is to decide whether, in the light of the statutory text and existing case law, the theory is so obviously unsustainable that it should not even be allowed to be pleaded.

[85] In my view, it is not. There is conceptual space, as the Appellant urges, to distinguish between:

- The existence of the board as a juristic entity, preserved under section 98(2).
- The continuation of powers and duties "subject to subsection (4)" under section 98(3); and
- The possible consequences, over a long period of complete inaction, of failing to comply with a peremptory duty to initiate transformation, particularly in relation to the enforcement of charges many years after the statutory regime changed.

[86] *Mostert* and *Crocodile River West* speak strongly to continuity; they do not, however, explicitly address whether there might be limits to the indefinite exercise of pre-1998 charging powers by a board that has never even attempted to comply with section 98(4).

[87] The amendment opens the door for the Appellant to advance a further line of argument which is not squarely addressed in *Mostert* and *Crocodile River West*. It is that an indefinite “interim” preservation of irrigation boards, with their full pre-1998 powers, is conceptually untenable because it effectively renders the transitional regime permanent and makes it unnecessary ever to embark upon the structural transformation contemplated by section 98(4). On this view, section 98(2) – (3) cannot be read as licensing the perpetual exercise of historical powers by a board that has never meaningfully engaged the transformation duty.

[88] Whether that line of reasoning is ultimately persuasive, and whether it can be reconciled with the statements in *Mostert* and *Crocodile River West*, is a matter for careful consideration on a fuller record and after full argument. At this stage, however, it suffices to say that such a contention is not, on its face, frivolous or inconceivable. It raises a serious question about the coherence of an interpretation that permits an “interim” status to ossify into a de facto permanent dispensation, thereby undermining the transformative purpose of the National Water Act.

[89] In my view, it would be premature at the amendment stage to conclude that the Appellant is not even entitled to plead this contention. The proper question is not whether the court will

ultimately accept the argument, but whether it is so clearly untenable that it should be shut out at the threshold. Given the wording of section 98, the acknowledged legislative silence on explicit consequences, and the constitutional imperative that public powers be exercised in conformity with statutory design, I do not consider it possible to say, at this early stage, that the Appellant's proposed argument falls into that clearly-untenable category.

[90] That is the specific factual constellation alleged here. It raises issues that go beyond the bare question whether a board still "exists" and whether some powers subsist; it implies questions about the rule of law, constitutional accountability in the exercise of public power, and the legitimacy of claims based on a statutory regime which the board has not brought itself into conformity with.

[91] Whether those arguments will succeed, and whether they can be reconciled with *Mostert* and *Crocodile River West*, is a matter for detailed legal argument, at the trial, where both sides can fully develop their submissions. It is not appropriate to pre-empt that evaluative exercise at the amendment stage by labelling the defence "excipiable" simply because it is ambitious and difficult.

## PREJUDICE

[92] There is no indication in the magistrate's judgment, nor in the record, that allowing the amendment would have caused the Respondent any prejudice of the kind that cannot be cured by costs or by reasonable procedural directions.

[93] Pusela has known of a section 98-based defence since the original plea. In that setting, the general rule that costs and, if necessary, postponement, will cure prejudice remains applicable.

[94] The refusal of the amendment, by contrast, shuts out a central defence from being argued in court *a quo*, and, if the order is not appealable or is upheld, may effectively prevent the issue from being properly ventilated at all. That outcome sits uneasily with both the *Moolman* test and with section 34 of the Constitution.

## CONCLUSION AND ORDER

[95] I therefore conclude that:

- The order of the magistrate refusing the amendment is appealable, as it has a final and definitive effect on the Appellant's ability to raise a substantial statutory defence in the court *a quo*.

- The magistrate misdirected himself in refusing the amendment on the basis that the proposed defence is excipiable, having acknowledged that the statute is silent and vague on the consequences of non-compliance and that the issue is open to interpretation.
- While *Mostert* and *Crocodile River West* significantly constrain the Appellant's position, they do not render the proposed defence so clearly hopeless that it should be excluded at the threshold; the defence remains at least sufficiently arguable to qualify as a triable issue for purposes of an amendment.

[96] It must be emphasised that this Court expresses no final view on the correctness of the Appellant's interpretation of section 98 or on the validity of Pusela's charging powers. Those questions remain open for determination in appropriate proceedings, whether by exception or at trial, where the interaction between section 98, *Mostert*, *Crocodile River West* and other constitutional and statutory considerations can be fully ventilated.

**IN THE RESULT, THE FOLLOWING ORDER IS MADE**

- a) The appeal is upheld.

b) The order of the magistrate, Tzaneen, dated 8 October 2024 under case no. 1612/2023, refusing the Appellant's application for leave to amend its plea and dismissing that application with costs, is set aside and replaced with the following:

*"1. The defendant's application for leave to amend its plea in accordance with its notice in terms of Rule 55A(1) and (2) dated 3 June 2024 is granted, and is granted the opportunity to file the amended plea within 20 days after the date of this order.*

*2. The plaintiff shall, if so advised, deliver any consequential amended replication or other pleading within 20 days of service of the amended plea."*

c) The costs of the application for leave to amend shall be costs in the cause."

d) The Respondent is ordered to pay the costs of the appeal, costs of counsel shall be taxed on scale C, as is contemplated in Rule 67A(3)(a).



G J DIAMOND

ACTING JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA, LIMPOPO  
DIVISION, POLOKWANE

I AGREE

A handwritten signature in black ink, consisting of a large loop and a horizontal stroke, is written over a solid black rectangular redaction box.

JT NGOBENI  
JUDGE OF THE HIGH  
COURT OF SOUTH AFRICA,  
LIMPOPO DIVISION, POLOKWANE

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Date heard: 29 August 2025

Date delivered: 17/02/2026

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 17/02/2026 .

POLOKWANE HIGH COURT