



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

JUDGMENT

**Reportable
Case No: 20219/2013**

In the matter between:

ABU MUNSHI

Plaintiff

and

MUHAMAD FUAD JOHNSON N.O.

First Defendant

YASMIN JOHNSON N.O.

Second Defendant

ERIC MICHAEL MARX N.O.

Third Defendant

in their capacity as the trustees for the time being of
THE JOHNSON FAMILY TRUST (IT 3241/97)

Coram: FAGAN, AJ
Heard on: 26 May 2026
Delivered on: 9 June 2026

Summary:

The plaintiff applied for leave to amend his particulars of claim. The defendants applied for security for costs. The two interlocutory applications were heard together.

The defendants alleged that the amendment was sought in bad faith and in the context of abusive litigation, particularly because a previous notice of intention to amend, to which the defendants had objected, was not pursued further, instead of which the plaintiff a considerable time later served a fresh notice of intention to amend.

The amendment would remove an incorrect allegation in the plaintiff's replication, thereby vindicating the defendants' rejoinder. It is not in bad faith. Furthermore, as the two notices of intention to amend are materially different from one another, neither bad faith nor an abuse of process has been shown by the defendants.

The application for security for costs does not allege an inability on the part of the plaintiff to satisfy an adverse costs order. The question arises whether it is necessary to show such inability where the plaintiff is an incola.

The reasoning in *Fitchet v Fitchet* 1987 (1) SA 450 (E), where security for costs was awarded despite an inability to pay not having been shown, is not altogether clear, and there are policy reasons against awarding security in those circumstances. Evidence of an incola plaintiff's inability to satisfy an adverse costs order is therefore required for an award of security for costs.

In any event, the onus of proving vexatiousness has not been discharged. The defendants have not explained why they did not take steps to bring the matter to trial.

ORDER

1. The plaintiff's application for leave to amend as set out in the notice of intention to amend dated 11 December 2025 is granted.
2. The plaintiff is to pay the costs of the application, including the costs of counsel on scale C.
3. The defendants' application for security for costs is refused.
4. The defendants (in their capacity as trustees for the time being of The Johnson Family Trust) are to pay the costs of the application, including the costs of counsel on scale C.

JUDGMENT

FAGAN, AJ:

Introduction

1. The plaintiff, Mr Abu Munshi, has applied for leave to amend the particulars of his claim. The defendants, who are the trustees for the time being of The Johnson Family Trust, resist the amendment.
2. In turn, the defendants have applied for an order that the plaintiff give security for costs, on the grounds that his case against them is vexatious.

A history of the pleadings

3. The plaintiff alleges in his particulars of claim that an agreement of sale of shares was concluded in September 2009 with the Johnson Family Trust. He alleges further that he cancelled the agreement on 19 November 2009. The

plaintiff on that basis claims repayment of the purchase price of the shares, being the amount of R3 million.

4. Summons was issued on 6 December 2013.
5. The defendants have raised prescription as a special plea. They allege that on his own version the plaintiff's right to claim restitution on cancellation accrued, and the debt in respect of restitution became due, by no later than 18 November 2010, being a month from when on the plaintiff's version the defendants should have transferred the shares to him.
6. On 3 August 2021 a replication to the special plea of prescription was delivered. In paragraph 6 of the replication it is asserted that the defendants had wilfully prevented the plaintiff from knowing of the existence of the debt, with the result that in terms of section 12(2) of the Prescription Act 68 of 1969 prescription did not commence to run until the plaintiff became aware of the debt. The plaintiff's claim would on that basis not have prescribed.
7. There are ten subparagraphs to paragraph 6, setting out facts and circumstances on which the plaintiff intended to rely in support of the allegation of wilful prevention. Paragraph 6.1 refers to an email from the defendants to the plaintiff of 3 November 2008 which, according to the plaintiff, constituted a representation by the defendants that the shares had been transferred to him. The plaintiff goes on to replicate that the defendants intended for him to rely on the representation (paragraph 6.2); and that he relied on the truth of the representation and was thereby induced to believe that the shares had indeed been transferred to him (paragraph 6.3).
8. In a rejoinder filed on 23 August 2021 the defendants deny that the email constituted a representation that the shares had been transferred to the plaintiff, saying that it plainly related to a different transaction. Moreover, rejoin the defendants, the email (November 2008) predated the sale agreement (September 2009).

9. On 19 June 2024 the plaintiff delivered a notice of intention to amend paragraph 6 of his replication.
10. On 19 July 2024 the defendants objected to the proposed amendment.
11. After the notice of objection was served, the plaintiff did not take any steps to amend the replication pursuant to his notice of 19 June 2024.
12. Instead, the plaintiff on 11 December 2025 gave notice afresh of his intention to amend the replication.

The application for leave to amend

13. The notice of intention to amend of 11 December 2025, and therefore the present application for leave to amend, seeks to make some minor amendments to the introductory section of paragraph 6 of the replication. These are uncontentious.
14. Paragraphs 6.1 to 6.3 of the replication are, in the notice of intention to amend, deleted in their entirety and replaced by new paragraphs 6.1 to 6.5. Paragraphs 6.4 to 6.10 of the existing replication are renumbered as paragraphs 6.6 to 6.12.
15. The new paragraphs 6.1 to 6.5 do not refer to any specific representations. Instead, it is alleged in general terms that the defendants at all relevant times made it clear to the plaintiff that the share transfer process was ongoing (paragraph 6.1). The plaintiff was under the impression that if the shares had not already been transferred to him, they were about to be transferred (paragraph 6.2). The defendants intended the plaintiff to rely on the representations (paragraph 6.3). The plaintiff did rely on the truth of the representations and was thereby induced to believe that the shares had been transferred to the Munshi Development Trust (paragraph 6.4). The defendants at all relevant times assured the plaintiff that the de facto situation was that the shares had been transferred to the Munshi Development Trust (paragraph 6.5).

16. It is necessary to explain the Munshi Development Trust. In paragraphs 6.4 and 6.5 of the existing replication (which would be paragraphs 6.6 and 6.7 of the amended replication) it is alleged that on or about 16 April 2010 the plaintiff instructed the defendants to cause the shares to be transferred from his name to that of the Munshi Development Trust, and that the defendants undertook to ensure that this was done.
17. The defendants advanced two grounds for their objection to the proposed amendment. The first is that the proposed amendment is not bona fide. The defendants say that there has been a material change, as between the current replication and the notice of amendment, in the allegations as to how the defendants wilfully prevented the plaintiff from coming to know of the existence of the debt.
18. The second is an omnibus ground which refers in the heading to vexatiousness and abuse of process, and goes on to: refer to the laggardly way in which the plaintiff has conducted the litigation; describe the new notice of intention to amend as an impermissible attempt to circumvent the need to apply for leave to amend pursuant to the objection to the first notice of intention to amend and to explain the delay in bringing that application; contend for prejudice by way of harassment, the need to incur legal costs, and the probability that witnesses' memories will have faded by the time the matter comes to trial; and maintain that the plaintiff must explain the reason for the excessively slow progress of the action and demonstrate his genuine intention to proceed to trial with all possible expedition.
19. The plaintiff then brought an application to amend in terms of rule 28(4) of the Uniform Rules of Court.
20. In the founding affidavit the plaintiff responds to the first ground of objection by saying that the substance of his replication remains the same, namely that the defendants wilfully prevented him from coming to know of the debt. He accepts the correctness of the rejoinder regarding the email of 3 November

2008, and says that it was necessary to remove the factually wrong assertion that had been made and to place the correct facts before the Court.

21. He responds to the second ground of objection by seeking to explain why it took so long to prepare the notice of intention to amend. Regarding the first notice of intention to amend, the plaintiff explains that on receipt of the notice of objection he was advised not to proceed with it, but rather to prepare a new notice. He contends that the first notice of intention to amend became inoperative when he did not pursue that amendment after the objection to it had been received, and that there is nothing to preclude him from filing a fresh notice of intention to amend.
22. In answer, the defendants repeat the two of grounds of their objection. The contention that there is nothing which precludes a party from seeking a new amendment where a previous notice of intention to amend was not pursued, say the defendants, is correct as far as it goes, but does not apply to the situation where the new notice of intention to amend is in identical terms to the first notice. In those circumstances one is dealing not with an abandonment of the first notice, but only with a failure timeously to bring an application.
23. In reply, the plaintiff points out this difference between the first and the second notice of intention to amend: whereas the first notice deleted the entire paragraph 6 of the replication, including paragraphs 6.4 to 6.10, the second notice retains these subparagraphs. He testifies further that he has been unable to find a document in his records similar to the one that he erroneously relied on in the replication, but says that he has managed to find others that will be provided in evidence together with his oral evidence of discussions he had with the first defendant and an auditor regarding the transfer of the shares. He does not attach to the replying affidavit the other documents he says he found; nor does he set out the nature of the discussions on which he intends to rely.

24. Whilst applications to amend are subject to the exercise of a judicial discretion, it is a long-established rule of practice that amendments will be allowed, save where the application to amend is mala fide or the amendment would cause an injustice to the other party that cannot be compensated by an appropriate costs order (*Moolman v Estate Moolman* 1927 CPD 27 at 29, the relevant passage being quoted with approval, for instance, by the Constitutional Court in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2020 (1) SA 327 (CC) para 89).
25. The two exceptions to the general rule are what the defendants rely on in their two grounds of objection.
26. The defendants say that the proposed exception is mala fide because it constitutes a change of tack that has not been explained. They refer to *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) at 641A, where Caney J held that a party who has already made out a case on the pleadings must explain the reason for changing or adding to that case, and cannot be allowed to harass the opposing party by an amendment which lacks any foundation or by raising an issue for which there is no supporting evidence. The defendants invoke, too, the authority of this Division in *Hansen v Concor-Grinaker (Pty) Ltd* 1974 (4) SA 27 (C) at 29G-H, where Burger AJ held (on the facts of that case) that a court, when considering a proposed amendment, must decide whether the existing pleading 'is merely due to inadvertence or a mistake or whether the plaintiff has in fact changed his attitude and now seeks to qualify an unqualified statement which he originally made, and it is possible that this unqualified statement may well have been made deliberately and not by way of mistake'.
27. The plaintiff has explained in his founding affidavit that he made a mistake by referring in the replication to an email which predated the sale agreement. He seeks to remedy this by removing the reference to that email and replacing it with the new paragraphs 6.1 to 6.5. In his replying affidavit he says that he confused two transactions in placing reliance on that email and that 'the

innocent mistake does not cast any doubt on my credibility and the *bona fides* of the version foreshadowed by the intended amendment’.

28. I do not see how the reference to an email which predated the sale agreement can have been anything but a mistake. The email clearly cannot sensibly be relied on as evidence of a representation that would for the purposes of resisting the special plea of prescription have had to be made after the conclusion of the sale agreement.
29. By deleting the reference to that email, the plaintiff vindicates the defendants’ rejoinder. No bad faith attaches to that deletion.
30. What is sought to be inserted by way of the new paragraphs 6.1 to 6.5 is fairly mundane. In general terms, the plaintiff alleges that the defendants brought him under the impression that the shares were going to be transferred to him; that the defendants intended for him to rely on representations to that effect; and that the defendants assured him that the shares had been transferred to the Munshi Development Trust.
31. There is therefore no change in attitude or significant addition to the case as it appears from the current replication; and support for these general propositions is to be found in the allegations contained in the original paragraphs 6.4 to 6.10, which the plaintiff intends to retain and renumber.
32. Ideally, the plaintiff should have been more specific and detailed in his affidavits about the other documents he claims to have found and the discussions he claims to have had (*cf Trans-Drakensberg Bank loc cit*). His reliance on the existing paragraphs 6.4 to 6.10 however means that his failure in that regard is insufficient to demonstrate a lack of *bona fides*.
33. Given the deletion of the offending allegation from the replication and the mundane nature of what the plaintiff seeks to insert, the amendment would not cause an injustice to the defendants. Even if there had been any injustice, an appropriate costs order would certainly have been capable of

compensating for it. The trial has not yet commenced, and the defendants are not hampered in their preparation by the proposed amendment.

34. One further ground on which the application to amend is opposed has been raised on behalf of the defendants. It is contended that the plaintiff has circumvented the requirements of rule 28(4) and rule 27 (condonation) by simply abandoning his first notice of intention to amend, in the face of the defendants' objection, and substituting for it a fresh notice.
35. In response to the argument of the plaintiff that the two notices are not identical, the defendants contend that this elevates form over substance, in that the proposed amendments to paragraph 6 and the introduction of the new paragraphs are identical in the two notices.
36. This however overlooks the fact that the first notice (19 June 2024) deleted the existing subparagraphs numbered 6.4 to 6.10, whereas the second notice (11 December 2025) retains them in renumbered form. That constitutes a material difference between the two notices, as is apparent from what I have said above in connection with the plaintiff's bona fides.

The application for security for costs

37. The plaintiff is an incola. There is no evidence to suggest that he would be unable to pay the defendants' costs, should his action be unsuccessful.
38. The defendants seek security for costs on the basis of vexatiousness: not that the action was always vexatious, but that the action has *become* vexatious due to the plaintiff's conduct – or want of conduct – over the many years since it was instituted.
39. 'An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action' (*Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) para 10, citing a considerable number of earlier judgments in support of the dictum). In the heads of

argument on behalf of the defendants, Ms Davis SC submitted that on this principle an order for security for costs may be justified a fortiori.

40. I raised the question of whether the test for security for costs, at least where the plaintiff is an incola, is not a different one, and referred to the recent judgment in this Division in *Cape Cash and Carry (Pty) Ltd and others v Xtreme Works (Pty) Ltd and others* 2025 (4) SA 156 (WCC), in which Janisch AJ said that the starting point in considering security for costs 'is the possibility that the applicant or plaintiff may be unable to satisfy a costs order in favour of the respondent or defendant if its claim fails' (para 12). The Court referred to *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2015 (5) SA 38 (SCA) para 14, where it was held that a court in an application for security for costs will have regard to 'the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action'.
41. I am indebted to both Ms Davis and Mr Ferreira, who appeared on behalf of the plaintiff, for providing me with supplementary notes on this question.
42. Ms Davis correctly points out to what Janisch AJ said in paragraph 17 of his judgment with reference to *Fitchet v Fitchet* 1987 (1) SA 450 (E). Olivier J, having been unable to find on the papers that the plaintiff would not be able to satisfy an adverse costs order (at 455A), nonetheless ordered the plaintiff to furnish security on the basis of being satisfied 'that the action is vexatious in the sense that it is one standing outside the region of probability altogether and is therefore incapable of succeeding' (at 455B-C).
43. I must respectfully confess to having some difficulty in following the reasoning of the Court in *Fitchet v Fitchet*, which proceeds as follows (at 454E-455B). One: in an application for dismissal of an action on the grounds of vexatiousness, the court 'will require moral certainty alone that the action is unsustainable'. Two: in an application for security for costs, on the other hand, 'the merits test should be somewhat less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account'. Three:

the plaintiff's ability to pay the defendant's costs 'is an obvious factor which should be taken into account'. Four: the plaintiff in this matter will on the probabilities be able to satisfy an adverse costs order. Five: therefore the application for security for costs should be approached on the basis of whether the action is incapable of succeeding.

44. Having started from the premise that the test that applies to an application for dismissal is different from the test where security for costs is sought, the Court ultimately collapses the distinction by using the test for dismissal in an application for security for costs. Having said that the plaintiff's ability to satisfy an adverse costs order is a factor that should obviously be taken into account where security for costs is sought, the Court awarded security for costs despite finding that the plaintiff probably had that ability.
45. It is perhaps not surprising in the circumstances that Thring J in this Division invoked *Fitchet v Fitchet* as his only authority for the following statement: 'In order to decide this question [of liability to furnish security for costs] it was necessary to consider first the prospects of the applicants being able to satisfy any costs order or orders which might be made against them in these proceedings in favour of the first respondent' (*Ramsamy NO and others v Maarman NO and another* 2002 (6) SA 159 (C) at 169F).
46. A defendant who is confident that the plaintiff's case is vexatious 'in the sense that it is one standing outside the region of probability altogether and is therefore incapable of succeeding' has available to her the remedy of dismissal. It is not apparent why such a defendant should not be obliged to grasp the nettle and bring an application for dismissal.
47. The dilution of what is appropriately a very stringent test might otherwise result. Ms Davis for instance submitted that, the remedy of security for costs being less drastic than the remedy of dismissal, the threshold required to be crossed in the former case should be lower than that in the latter. (To be clear, that is not how the issue was approached in *Fitchet v Fitchet*: the test for dismissal was applied without qualification.)

48. One is concerned, too, about the distinction that an application for security for costs solely on the ground of vexatiousness makes between the foolhardy plaintiff who is able to provide security, and therefore is able (having provided security) to continue with her unmeritorious case, and the foolhardy plaintiff who is impecunious and therefore unable to continue. Whilst one might quip that the impecunious plaintiff is being protected from the consequences of her own foolhardiness, the fundamental point is of course that the right of access to court would be differentially available to these plaintiffs based on their means.
49. It may be contended, in response, that this difference applies to an application for security for costs brought against an incola plaintiff in the ordinary course: the vexatious plaintiff who is able to provide security can continue with the action, whereas the one who is unable to do so cannot. That would however be to overlook the primary purpose of security for costs, which is that a defendant in a vexatious action should not be out of pocket at the end of the proceedings: a plaintiff should not be permitted by way of vexatious litigation to cause her opponents to incur 'unnecessary and irrecoverable expenses' (*Boost Sports Africa supra* para 9; see also *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 7). The limitation of the right of access to court is justified by the importance of protecting the defendant against such irrecoverability in what is a wholly unmeritorious case (cf *Giddey NO supra* paras 8 and 30).
50. There is a balancing of the competing rights of the plaintiff (to have access to court) and the defendant (not to be out of pocket), a balance which at the very least shifts significantly where the defendant will be able at the end of the day to recover legal costs.
51. I am therefore of the view that evidence of an incola plaintiff's inability to satisfy an adverse costs order is required for an award of security for costs.
52. Even if I am wrong about that, though, it seems to me that the defendants in the present matter face this difficulty: once the action was instituted, the mere

fact that the plaintiff is *dominus litis* does not mean that the defendants were not entitled and able to press for the matter to come to trial. One understands, of course, why the defendants would not necessarily have done so: they may well have anticipated, or at least hoped, that the matter would die a quiet death. But I do not think that a defendant who chooses to remain supine in the face of delay by a plaintiff in prosecuting an action can then use – at least without providing an explanation for her own inactivity – the fact of that delay as a ground for seeking security for costs. In *Cassimjee supra* para 11 Boruchowitz AJA said that one of the considerations to which a court should have regard in considering whether to dismiss an action for want of prosecution is ‘the reasons, if any, for the defendant’s inactivity and failure to avail itself of remedies which it might reasonably have been expected to use in order to bring the action expeditiously to trial’. The defendants have not advanced such reasons.

53. Regarding the alleged vexatiousness of the plaintiff’s action, considerable reliance was placed by the defendants on the failure on the part of the plaintiff to have pursued his initial notice of intention to amend to the stage of applying for that amendment, and instead having served a new notice of intention to amend. What I have said in paragraph 36 above about the materiality of the differences between the two notices means that the plaintiff was not however simply wasting time by seeking, on the second occasion, to achieve the same amendment as previously.
54. Mr Ferreira submitted in argument that one cannot infer vexatiousness from tardiness. As a general proposition, that must be right. More would have to be shown, and the defendants have in my view fallen short in seeking to discharge the onus that they bear in that respect. It is relevant to the exercise of the Court’s discretion that the plaintiff is 79 years of age and has been in poor health. Notwithstanding the lengthy period that has elapsed since the institution of proceedings and the stop-start way in which the litigation has been conducted, he should be allowed to proceed with his action without the need to provide security for the defendants’ costs. The exceptional circumstances that would justify such an order are not present here.

Costs

55. With his application for leave to amend the plaintiff has sought an indulgence. I do not regard the opposition to the application as having been unreasonable, particularly given the failure on the part of the plaintiff to have substantiated the allegations in paragraphs 6.1 to 6.5 of the amended replication with the evidence that the plaintiff claims to have.
56. There is no reason why costs should not follow the result of the defendants' unsuccessful application for security for costs. The plaintiff, contending that the application was so unmeritorious as to indicate mala fides on the part of the defendants, has sought punitive costs. I am certainly unable to find that the application was brought in bad faith.
57. The quantum of the plaintiff's claim in the action warrants the seniority of the counsel who appeared for the respective parties, who moreover appeared alone, and costs on scale C are accordingly justified.

Order

58. The following order is made:
- (a) The plaintiff's application for leave to amend as set out in the notice of intention to amend dated 11 December 2025 is granted.
 - (b) The plaintiff is to pay the costs of the application, including the costs of counsel on scale C.
 - (c) The defendants' application for security for costs is refused.
 - (d) The defendants (in their capacity as trustees for the time being of The Johnson Family Trust) are to pay the costs of the application, including the costs of counsel on scale C.

E W FAGAN
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

Appearances

For the plaintiff: A Ferreira
Instructed by: K J Bredenkamp Attorneys

For the defendants: D M Davis SC
Instructed by: Korbers Inc