IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case number: 6639/2021

In the matter between:

TARAWAY EMPIRE (PTY) LTD	**Plaintiff**
And	
TOTAL SOUTH AFRICA (PTY) LTD	**Defendant**

Coram:	**Pangarker J**
Judgment delivered:	**28 July 2026**

JUDGMENT

PANGARKER, J

Introduction

[1] The parties are embroiled in a defended action which is being case managed. On 1 August 2024, the plaintiff gave notice of its intention to amend its Particulars of Claim, which was met with an objection in terms of Rule 28(3). Subsequently, the

plaintiff delivered an application for leave to amend its Particulars of Claim. The parties are referred to as cited on the pleadings.

The pleadings

[2] Before turning to the application, it is necessary to set out the pleadings, as summarized. The Summons was issued in April 2021. The plaintiff is a company which has its registered address in Koeberg Road, Brooklyn. It pleads that it is the owner of five units forming part of a sectional title scheme including the land and buildings on Erf 164590, together with an exclusive use area described as Forecourt FCI which is part of the property comprising Number 1 Koeberg Road. Collectively, these are referred to as *"the immovable property"*.

[3] In terms of a written lease agreement concluded between the defendant and the plaintiff's predecessor and thereafter amended by written addendum in 1999 with the owner at the time, the defendant leased the property. The latter lease agreement is referred to as the head lease agreement.

[4] It was known to the plaintiff, that the defendant sublet the property to a tenant, whose details are unknown, who/which operated a Total Service Station at the property, known as Total Brooklyn.

[5] The property was transferred into the plaintiff's name on 6 August 2019. The defendant continued to pay rental to the plaintiff after such transfer and in terms of the head lease.

[6] The head lease terminated on 30 September 2019 due to the effluxion of time. The plaintiff was represented by Mr A Mukadam and the defendant, by Mr A Siebert, and the parties verbally extended the head lease on various terms:

6.2.1 the Lease will continue on a month to month basis on the same terms and conditions as The Head Lease Agreement (The Lease Agreement)

6.2.2 the Defendant would pay a monthly rental of R280 513,44 to the Plaintiff, effectively from 1 October 2019,until such time as one of the parties terminates the agreement by giving notice;

6.2.3 the Defendant will pay for the municipal services;

6.2.4 on termination of The Lease Agreement, the Defendant is obliged to:

6.2.4.1 decommission the Total Service Station operated by its sub-tenant and remove all fixtures and fittings, structures and equipment from The Immovable Property;

6.2.4.2 reinstate The Immovable Property to the same condition in which it was, prior to the improvements which had been effected inter alia to operate Total Brooklyn; and

6.2.4.3 restore vacant possession of The Immovable Property to the Plaintiff.[1]

[7] On 9 July 2020, the plaintiff gave written notice of termination of the lease and the parties agreed that the defendant would give vacant possession on 1 October 2020 on the following conditions:

7.2.1 Defendant had to decommission the Brooklyn Service Station;
7.2.2 Defendant had to remove all fixtures, fittings, structures and equipment;

[1] Particulars of Claim

7.2.3 Defendant had to reinstate The Immovable Property to the same condition in which it was prior to the improvements which had been affected inter alia to operate Total Brooklyn;

7.2.4 Defendant had to achieve the SSTL as stipulated in The Remedial Order; and

7.2.5 Defendant undertook to notify the Plaintiff should environmental or other unforeseen circumstances delay delivery of vacant possession of The Immovable Property to the Plaintiff on 1 October 2020.[2]

[8] In January 2015, the Department of Environmental Affairs (DEA) issued the defendant with a remedial order: in respect of Total Brooklyn, certain target levels had to be achieved by way of remedial action due to fuel contamination on site. This was referred to as Site Specific Target Levels (SSTL) which remained in effect until the levels were reached. The terms and conditions of termination were confirmed by Mr Siebert on 25 August 2020 as per POC1 attached to the Particulars of Claim.

[9] It is pleaded that the defendant halted payment of rental, did not advise of any environmental or other unforeseen circumstances which delayed delivery of the vacant property and failed to comply with the terms and conditions of termination. Vacant possession was not restored by 30 September 2020; the defendant left a structure on the property with column bases constructed of concrete; the canopy attached to the structure was not removed with the result that the plaintiff appointed a third party to remove the column and demolish the bases in December 2020, at a cost of R133 975. Vacant possession was restored to the plaintiff in December 2021.

[10] In terms of its action, the plaintiff sues for damages in relation to loss of rental income for October to December 2020 because of the defendant's breach of contract, which totals R841 561,23, plus damages consisting of costs to restore vacant possession. The total rental claim is reduced to R677 190,11 as the defendant paid

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[2] Particulars of Claim

R164 360,21 in March 2021. The written head lease is not attached to the plaintiff's pleadings.

[11] The defendant filed its Plea and filed a Counterclaim, the latter pleading later amended. The defendant admits the plaintiff's ownership of the property; its rental in terms of the head lease; that it sublet to a tenant who operates Total Brooklyn and that it was required to comply with the SSTL prescribed by the DEA. The defendant notified the plaintiff on 30 September 2020 that it finalized the decommissioning and removal of its equipment on the property and would have no further obligation in terms of the property.

[12] Furthermore, the defendant only agreed to restore beneficial occupation of the immovable property (not vacant occupation) and its actions did not impact the beneficial impact of the plaintiff. The defendant complied with its obligations insofar as the decommissioning of the property was concerned and delivered beneficial occupation on 1 October 2020. The defendant removed its fixtures, equipment and structures, which it owned.

[13] At paragraph 4.5 of the Plea, the defendant denies that it owns the canopy located on the immovable property and refers to the notarial lease agreement. Accordingly, the defendant pleads that it was not required to remove the canopy. In the alternative, it is pleaded that the remedial order of the DEA was a *vis major* event which rendered the obligation to provide vacant occupation impossible until such time that the defendant was able to achieve the SSTL.

[14] Save to admit the payment it made to plaintiff of R164 360, 21, the remainder of the plaintiff's averments are denied. In its Counterclaim, the defendant pleads that the latter payment was made in error to the plaintiff, and was neither owing nor due to it, but that the plaintiff appropriated the amount. The Counterclaim is thus based on the plaintiff's unjustified enrichment in the sum of R164 360,21.

[15] The Replication to the Plea denies that the parties agreed to beneficial occupation, and that a notarial deed of lease is attached to the Particulars of Claim. Aside from the above, the remainder of the Counterclaim is denied and the defendant is put to the proof thereof.

Notice of amendment

[16] In its notice of amendment, the plaintiff seeks several amendments, some of which are minor. Having read and considered the Particulars of Claim, the Notice of Amendment and the objections thereto, the material amendments which the plaintiff seeks in respect of the Particulars of Claim are set out below:

[16.1] To paragraph 4.1 and its sub-paragraphs:

(i) removing the reference to a sub-lease;

(ii) including an averment that the property was occupied by someone unknown, who operated the Total Brooklyn;

(iii) removing the reference to a head lease agreement;

(iv) inserting / pleading an oral and tacit lease agreement concluded between the plaintiff and defendant, in terms of which a third party occupied the property; that the defendant continued to pay R280 513,44 per month to the plaintiff, and that a month-to-month lease could be terminated by either of the parties on one month's notice.

[16.2] The insertion in paragraph 6 (re-numbered) to include a reference to an *"extended lease agreement"* in the heading.

[16.3] The deletion of paragraph 6.1 and the reference to a head lease agreement (re-numbered to 5.1). By pleading in its place that POC1 dated 16 August 2019 (by Mr van Schalkwyk on behalf of the defendant) was a misrepresentation in that no notarial lease agreement existed at the time, and consequently the parties, represented by Mr Mukadam and Mr Siebert, verbally extended the lease, on a month-to-month basis.

[16.4] The deletion of *"vacant possession"* in paragraph 6.2.4.3 and replacing it with *"in the same condition as it was at the commencement of the lease agreement"*.

[16.5] Further amendments seeking a removal of the reference to vacant possession and replacing it with a reference to *"compliance with the terms and conditions of termination"*[3].

[16.6] The period of breach / non-payment of the rental is to be deleted and replaced with October 2020 to January 2021. The various amounts related to rental due would also be adjusted.

[16.7] The amendments also see the plaintiff intending to introduce averments that the terms and conditions of termination were complied with on 1 February 2021 when the defendant informed the plaintiff in writing as per POC4 that the SSTL in the remedial order had been achieved and that the extractor unit would be removed on 1 February 2021.

Objections to the proposed amendments

[17] The defendant's objections to the proposed amendments are summarized below:

[17.1] The defendant, in its Plea, admits the written lease between the parties (or defendant's predecessor and the plaintiff) as pleaded in paragraph 4.1. The proposed

[3] Particulars of Claim, paragraph 8.1

amendments, if allowed, would result in a withdrawal of facts which are admitted and that are common cause between the parties. In addition, the newly pleaded case would mean that a different factual version is presented: the written lease is replaced with an oral and tacit lease agreement. The above forms the basis of the first objection.

[17.2] The second objection to the proposed amendment to paragraph 4 of the Particulars of Claim, is that if the amendment is allowed (that is, an oral and tacit agreement), then the amendment would fall foul of Rule 18(6) in that the place, date, and representatives of the parties, would not have been pleaded. This would also cause the pleading to offend Rule 18(4).

The application for leave to amend

[18] The plaintiff's case in its application is that it mistakenly believed that when it procured registered ownership of the property, it was subject to a written lease agreement with the defendant. This mistaken belief was bona fide and created by the defendant's representative, Neil van Schalkwyk[4].

[19] The plaintiff furthermore alleges that in respect of POC1, it complied with Rule 18(6) and blames the defendant, which relies on a written notarial lease, for not complying with Rule 18(6) as no written notarial lease is attached to the Plea.

[20] The plaintiff addresses, in some detail, various documents obtained through the discovery process. It denies that the/a written lease is common cause between the parties as it was not attached to the pleadings and its terms have not been pleaded nor admitted. Thus, the Plaintiff submits, the submission regarding common cause facts as raised in the defendant's objection, cannot be sustained.

[4] TE4

[21] In respect of the second objection, the plaintiff states that it does not rely on a lease agreement to sustain its cause of action, but rather, on the written termination concluded between the parties, after the lease agreement was terminated.

[22] The answering affidavit by Mr Fortuin, the legal advisor of the defendant, recites its objections. The defendant persists that the averments in paragraph 4.1 and subsequent paragraphs of the Particulars of Claim, save for a denial that the defendant was to provide vacant occupation, are common cause on the parties' pleadings. Furthermore, on the pleadings, the conclusion of a written lease is common cause.

[23] The defendant alleges in the affidavit, and has argued during the hearing, that more than 3 years after the Summons was issued, the plaintiff seeks to amend its pleading, leading to the conclusion that the amendment is not *bona fide.* The plaintiff fails to explain why the pleaded facts would change so drastically (were the amendment to be effected).

[24] The replying affidavit questions Mr Fortuin's knowledge of the facts; his failure to address the specific paragraphs of the answering affidavit; his failure to admit/deny averments in the founding affidavit; and a failure to refer to confirmatory affidavits.

[25] Mr Mukadam's replying affidavit addresses the various documents and AA1, conclusions to be drawn from the documents, and the failure of the defendant's Mr Fortuin to address averments in paragraphs 14 to 16 and 19 to 26 of the founding affidavit. The plaintiff denies that its proposed amendments are *mala fide.*

Legal principles related to amendments to pleadings

[26] In respect of amendments to pleadings generally, it must be emphasized that the object of the court is to do justice between the parties, and where a mistake as to

the true facts are made on a pleading, the court will look at what circumstances actually occurred between the parties[5]. Furthermore, the court hearing an application for leave to amend, or faced with a proposed amendment to a pleading, retains an unfettered discretion, which must be exercised judicially in view of the facts and circumstances of a matter.[6]

[27] The further principles when confronted with an amendment to a pleading are:

[27.1] Is the application for leave to amend, made in good faith?

[27.2] Would the amendment, if allowed, cause an injustice to the other party which cannot be compensated by an appropriate costs order?

[27.3] A reasonable explanation for the delay in bringing the amendment, must be made.[7]

[27.4] If the amendment will render the amended pleading expiable (not may render it expiable) then it should be refused[8].

[27.5] Where the proposed amendment seeks to withdraw an admission, a full explanation is required from the party seeking to amend in order to determine its *bona fides*. In addition, the prejudice to the other party, if the amendment is allowed, must be considered. The court still retains a discretion to allow the amendment, but where

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[5] ***Morant v Roos* 1911 TPD 1092 at 1102-1103**

[6] ***Ciba-Geigy (Pty) Ltd v Lushoff Farms (Pty) Ltd 2002 SA 447 (SCA) at 462***

[7] The Civil Practice of the High Courts of South Africa, Fifth edition), Herbstein and Van Winsen, AC Cilliers et al, p680-681

[8] Herbstein and Van Winsen, p683

the explanation regarding the circumstances in which the admission was made (in the first instance) and the reasons for withdrawing it are not satisfactory, the amendment would be more difficult to achieve.

[27.6] Where an amendment, if effected, would render a pleading excipiable, the court may (absent an exceptional case/circumstance or the balance of convenience) refuse leave to amend[9].

[28] In ***Media 24 (Pty) Ltd v Nhleko & Another***[10], the Supreme Court of Appeal emphasized that when it comes to prejudice in respect of amendments, where the opponent is worse off than he/it/she was at the time of the amendment - for example, the withdrawal of the admission would have a detrimental effect on its case -it would be prejudicial to grant leave to amend. Furthermore, it is the pleadings which dictate or determine the issues between the parties.

Discussion and findings

[29] The first aspect is the affidavit of Mr Fortuin and whether he has knowledge of the facts and specifically, personal knowledge. He is the legal advisor of the defendant, and the court accepts that he is not one of the representatives referred to in the Particulars of Claim nor POC 1. He is also not referred to in the annexures attached to the Plea.

[30] The attempt to deliver a supplementary affidavit was argued during the hearing and after providing reasons therefore *ex tempore*, the court refused the admission of the supplementary affidavit which included a further affidavit by Mr Fortuin. The submissions by the plaintiff, both written and oral, indicate that they still take issue with the affidavit of Mr Fortuin to the extent set out in pages 86 to 88 of the record.

[9] See ***Sebenza Consultancy v Petroleum Oil & Gas Corp of SA 2006(2) SA 52 (C) at 58***
[10] [2023] ZASCA 77 at par [17]

[31] In the court's view, it would not be unusual for a legal advisor of the defendant company to have knowledge of the facts of a matter in which the defendant finds itself the subject of litigation. Whilst it is correct that Mr Fortuin is not the signatory of any of the documents or annexures attached to the pleadings, nor those referred to in the founding affidavit to the application, in the court's view, the affidavit cannot simply be excluded because he has failed to explain more comprehensively how he has personal knowledge of the facts related to the action pending between the parties.

[32] The matter was argued with reference to the objections raised in the affidavit. While Mr Fortuin's affidavit indeed suffers from a failure to: (i) address each paragraph in the founding affidavit; (ii) admit or deny the statements of fact in the founding affidavit, and (iii) attach any confirmatory affidavits to join issue with unanswered allegations, it is accepted and considered for purposes of this application. To reject the affidavit or simply ignore it, when the matter was argued, would be a case of having too formalistic approach.

[33] The parties in this matter are reminded that the pleadings are, by virtue of their essential pleaded facts (*facta probanda*), the be-all and end-all of the parties' dispute in the action[11]. For this reason, the *facta probantia,* the evidence needed to prove its case, is not required of a pleader. As far as the application to amend is concerned, extraneous documents not attached to the pleadings and not sought to be included in the proposed amendment(s), carry little weight as it is the pleadings which the court is required to take cognizance of.

[34] The first question to ask is, why does the plaintiff wish to amend its pleadings in the manner set forth in the notice of amendment? Mr Mukadam explains at paragraphs 14 and 15 of his affidavit, that when the plaintiff obtained registered ownership of the property in question, it was under the mistaken belief that the property/it was subject to a written lease with the defendant. The mistaken belief was

[11] ***Media 24*** *supra*, par [18])

created by representatives of the defendant during negotiations to extend the alleged written lease which occurred in August 2019. From the authorities, it is clear that an admission or admitted fact can be withdrawn where it came about because of a mistake of fact or law.[12]

[35] While the plaintiff has submitted that it does not rely on a lease agreement, but rather that its cause of action relies on a termination agreement, hence the amendment does not seek to withdraw an admission, I highlight that the plaintiff's damages claim comprise loss of rental for certain months and the cost to restore vacant occupation. The claim for damages in respect of the rental amount clearly relies on the extended head lease as pleaded in paragraph 6.2 and its sub-paragraphs in the Particulars of Claim. Thus, to argue and submit that its case is not based on a lease and only on the termination agreement, POC1, is not correct.

[36] The defendant admits paragraphs 4 and 6 of the Particulars of Claim, except that it denies the averment regarding vacant occupation. Thus, on an ordinary reading of the Particulars of Claim and Plea, the written head lease and its extension by the parties (as represented) are admitted. The submission by the defendant is thus correct. Furthermore, aside from the denials in the Reply to the Plea, this further pleading (by the plaintiff) reinforces the admission initially made in the Particulars of Claim.

[37] One is thus dealing with an amendment which is a withdrawal of an admission. When having regard to the notice of amendment (paragraph 8 thereof which seeks to amend paragraph 4.4 and the additional/sub-paragraphs), then it is clear that what the plaintiff wishes to introduce is a change of front: from a head lease/written lease agreed between the parties to an oral and tacit agreement, with terms as set out in paragraphs 4.4 to 4.4.3 in the notice of amendment.

[12] Herbstein and Van Winsen, p684

[38] In seeking to withdraw an admitted fact, the plaintiff is required to provide an explanation for the delay in bringing the amendment and the court is required to determine if the amendment is *bona fides.*

[39] In reading the affidavit of Mr Mukadam, it is apparent that he deals with the pre-contractual misrepresentations and the documents perused in the discovery process. The timeline, at best for the plaintiff, brings one to August 2020. This action was instituted in April 2021, and the notice of amendment was delivered in August 2024. Nowhere in the affidavit supporting the leave to amend application does Mr Mukadam provide any explanation for the delay in wishing to amend more than three years after institution of the action.

[40] The mistaken belief, as pleaded, that the property was subject to a written lease, is not given a time stamp. In other words, the plaintiff does not say that it or its representative realized that it was under the mistaken belief that there was a written lease, on a specific date, and only on realization thereof, it set about to give notice to amend. The mistaken belief seems, from the pleaded averments, to have come about on some unknown date, possibly 16 August 2019, but the court is left guessing.

[41] The result of this failure - and given that the action was instituted in 2021 and the notice of amendment delivered in 2024 - in no way explains the delay, nor why the plaintiff now seeks to amend pleadings in circumstances where the parties admit the written lease. The court is thus left questioning the *bona fides* of the amendment and/or the reason to amend.

[42] The plaintiff complains that the defendant itself pleads the existence of a notarial lease yet does not attach same to its Plea. With respect, this does not assist the plaintiff as it bears the responsibility to show that its intended amendment is *bona fide*. One is simply not given reasons why, after three years, the admission of a written lease is sought to be withdrawn.

[43] The next question is whether the amendment would render the Particulars of Claim excipiable. Once again, the emphasis is on the main amendment sought, which is set out at paragraphs 8, 11, 12 and 13 of the notice of amendment. In a nutshell, the plaintiff, if the amendment is allowed, would rely on an oral and tacit lease agreement, payment of R280 513,44 per month, and a month-to-month lease subject to one month's written notice to terminate.

[44] As a reminder, the court has earlier indicated that the damages claim consists of two components: damages in respect of rental for certain months, and the costs to restore vacant possession. On the court's understanding of paragraph 11 of the Notice of Motion, the proposed amendment at paragraph 8 (oral and tacit lease) is supported or reinforced by the averments that the reference by Mr van Schalkwyk in POC1 was a misrepresentation because no notarial lease existed between the parties.

[45] The difficulty with these proposed amendments, as correctly submitted by the defendant's counsel, is that if allowed, it would render the Particulars of Claim (as amended), excipiable because it would fall foul of Rule 18(6), in that it is not pleaded when the alleged oral and tacit agreement was concluded, and where and by whom it was concluded. This requirement is peremptory and non-compliance would result in the Particulars of Claim being deemed to be an irregular step in terms of Rule 18(12). Put differently, the *essentialia* as required by Rule 18(6) would be absent and the pleading would certainly be excipiable.

[46] The plaintiff's submission is that in any event, the defendant relies on a written notarial lease which it does not attach and does not indicate how it would be prejudiced if the amendments are effected. The problem with this submission is that the court is not dealing with an exception to the Plea.

[47] Secondly, it is for the plaintiff to show that the proposed amendment is *bona fide* and that it is not excipiable. The plaintiff's approach is that the amendment should be allowed notwithstanding the fact that in the amended form, the pleading would not

comply with Rule 18(4) and (6). This cannot be. Considering the pleadings as a whole and the current application, it cannot be said that the peremptory Rule 18 requirements are met. Even if the court were to ignore the objections and Mr Fortuin's affidavit, it would still be seized with an amendment seeking to withdraw an admission, where no explanation is provided for such withdrawal, where no explanation is given for the delay, and where the pleadings would be excipiable.

[48] There are no exceptional circumstances raised nor a balance of convenience argued which would persuade the court to allow an amendment which would render the pleading excipiable. It is also not competent to argue that because the defendant pleads reliance on a written notarial lease, which it does not attach to its Plea, therefore the plaintiff's amendment should be allowed. It was always open to the plaintiff to except to the Plea, which it has not done.

[49] The prejudice to the defendant, in allowing an amendment which renders the Particulars of Claim excipiable, is self-evident. The withdrawal of the admission, which the plaintiff not only pleads but also accepts in its Replication, would affect the defendant's pleaded case, and an appropriate costs order would not, in the court's view, remedy the prejudice.

[50] Ultimately, if the court's discretion to allow the proposed amendment is exercised in the plaintiff's favour, the result would be pleadings which fall foul of Rules 18(4), (6) and (12). In the result, and for the reasons set out above, the application for leave to amend shall be dismissed.

[51] As for costs, the objections were well taken, and as indicated above, if this were a simple amendment, the Plaintiff would still have had hurdles to overcome in relation to the withdrawal of an admission and excipiability of pleadings.

Order

[52] In the result, the following order is granted:

1. The application is dismissed with costs, including costs of counsel on scale B.

2. Costs occasioned by the postponement of 5 August 2025 and any costs related to the matter not being enrolled, shall be costs in the cause.

[redacted]

M PANGARKER

JUDGE OF THE HIGH COURT

Appearances:

For Plaintifft: Adv A Heunis

Instructed by: Laubscher and Associates
Per Mr MN Laubscher

For Defendant: Adv M Schoeman

Instructed by: Messina Inc.
c/o Shepstone & Wylie