



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 5393/2021

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

SIGNATURE

24 AUGUST 2026
DATE

In the matter between:

BMW FINANCIAL SERVICES

(SOUTH AFRICA) (PTY) LIMITED

APPLICANT

And

RIYADH DOOLA

RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] The parties in this matter are locked in seemingly very acrimonious and protracted litigation with applications and counter applications flowing back and forth.

[2] In this application the parties will be referred to as in the main application for purposes of convenience.

[3] The applicant is BMW Financial Services South Africa (PTY) Limited, a company with limited liability duly incorporated and existing under the company laws of the Republic of South Africa and having its registered address and principal place of business at 1[...] B[...] Avenue, Randjiespark, Extension 17, Midrand.

[4] The respondent is Riyadh Doola, a major male person with full contractual capacity whose chosen *domicilium citandi et executandi* is Clearwater Mall, Shop [.....], Strubenvally, Gauteng.

[5] On 09 June 2017 an entity called Northend Showroom CC (Northend), of which the respondent was a sole member and through its duly authorised representative, concluded an Instalment Agreement with the applicant. The entity subsequently became deregistered, so the applicant alleged. At the time the summons was issued, the applicant elected to proceed against the respondent as the entity had been deregistered, besides there was a suretyship at play.

[6] The respondent defended the matter and asserted that the entity was not deregistered but was in liquidation. The respondent further raised other defences including the fact that he had made an offer in “full and final settlement” of the dispute between the parties, which offer was accepted by the applicant. The respondent further denied being in default or in breach of the agreement.

[7] There were other applications back and forth between the parties such as the application for summary judgment, which was opposed; condonation applications, and other pleadings and notices being exchanged, eventually however and fast forward to February 2022, the applicant launched an application in terms of Rule 28(4) of the Uniform Rules of Court¹, to amend the particulars of claim, which application the respondent opposed. The proposed application for amendment was however limited and/or circumscribed. It sought to amend or add three paragraphs to the particulars of claim which I will return to later, as well as the addition of two annexures to the particulars of claim. It was however objected to on the basis that, among others, it sought to introduce new causes of action in an attempt to correct issues in the particulars of claim; that it introduces a new cause of action based on an acknowledgement of liability in respect of an alleged shortfall and lastly that the proposed amendment was not in accordance with the Rules of Court.

[8] Opposition of the application was followed by two counter applications from the respondent. Firstly, that the applicant should be declared a vexatious

¹ 28. Amendment of pleadings and documents

...

...

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

litigant. Secondly, that costs should be awarded against the applicant on attorney and client scale from inception of the litigation up to the granting of the order in terms of Rule 28(4).

Point in limine

[9] The respondent raised a point *in limine*. It was agreed at the commencement of the hearing of the matter that the point *in limine* will be argued first, thereafter the parties will argue and move their respective applications. In arguing their respective points, the respondent contended that the person who deposed to the affidavit in support of the Rule 28(4) application, the attorney for the applicant Ms. Lina Marema-Oyebola, lacked the requisite authority to depose to the affidavit founding the application. It was particularly submitted on behalf of the respondent that all that the affidavit asserted, was that the attorney was entitled to depose to the affidavit; that the facts therein are within the attorney's knowledge; that Velile Tinto Attorneys have been appointed as attorneys of record for the applicant and that the attorneys possessed the file. Lastly, that they had access to all the documents. Therefore, it was contended on behalf of the respondent, that the attorney lacked *locus standi* and therefore the point *in limine* should be upheld.

[10] Counsel for the applicant argued that there was simply no merit in the point *in limine* and that it should be dismissed. She further submitted that the correct pathway to what the respondent sought to achieve through the point *in limine* was to utilise Rule 7(1)² so that proper authority could be proven after

² **7 Power of Attorney**

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

the filing of a requisite notice challenging authority by the concerned party. In addition, counsel submitted that there was minimal risk that Velile Tinto Attorneys, a prominent law firm representing the applicant, would simply act in the matter without the requisite authority. Therefore, the attack of the authority of the attorney was without merit.

[11] Counsel further submitted that the point *in limine* should be dismissed as there were well established principles about how to go about challenging a party's authority. Further, she added, there is ample case law setting out the principles to be followed when challenging authority.

[12] In reply, counsel for the respondent asserted that counsel for the applicant was misleading the court, which assertion caused consternation and was immediately objected to by counsel for the applicant. Counsel for the respondent referred the court to a resolution of the applicant on CaseLines and argued that nowhere in the resolution is the issue of an attorney signing documents mentioned³. Counsel reiterated her prayer that the point *in limine* be upheld with costs.

Discussion

[13] The manner of challenging authority is well settled in our law. There is of course a difference between authorising the institution or defence of proceedings on the one hand and authority to act on the other. As I understand the point *in limine*, the respondent is challenging the authority of the applicant's legal representative to act particularly in relation to deposing to the founding affidavit. Counsel specifically argued the point *in limine* with reference to the

³ CL 3-63 and CL 3-63.

founding affidavit deposed to by the attorney of the applicant, and pointed to the portion therein about the attorney having access to documents.

[14] In *FirstRand Bank Limited v Hazan and Another; FirstRand Bank Limited v Hazan Wholesalers and Distributors*⁴ the court had occasion to set out succinctly the correct legal position, mentioned below, on facts about authority which are not dissimilar to this matter;

“[12] The respondents challenged the authority of the deponent to FNB’s founding affidavit, Barend Johannes de Beer (‘Mr de Beer’), a recoveries manager of FNB, to depose to FNB’s founding affidavit and to bring the application on behalf of FNB.

[13] In determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised. The remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is not to challenge the authority in the answering affidavit but instead to make use of Rule 7(1) of the Uniform Rules of Court. See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para [14]-[16]; *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para [18]-[19]; *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para [27]-[28] and *FirstRand Bank Ltd v Fillis* 2010 (6) SA 565 (ECP) para [12] - [13].

[14] The respondents did not avail themselves of the procedure provided for in Rule 7(1), and it is thus not open to the respondents to challenge the authority of the deponent to FNB’s founding affidavit either in regard to deposing to the affidavits or in regard to

⁴ *FirstRand Bank Limited v Hazan and Another; FirstRand Bank Limited v Hazan Wholesalers and Distributors CC* (2013/47366, 2013/47367) [2016] ZAGPJHC 20; [2016] 2 All SA 112 (GJ) (18 February 2016) para 12 to 14.

instituting the applications. There is no merit in the contention of lack of authority on the part of the deponent to FNB's founding affidavit." (The underlining is my emphasis.)

[15] At the hearing of the matter counsel for the respondent did not attempt to seriously engage with the choice to forgo Rule 7(1) and opt to raise a point *in limine* instead. This after counsel for the applicant was at pains to point out that there were plenty decided cases and that it was a well settled area of the law.

[16] In the absence of authority, from the respondent, for the proposition that a point *in limine* is the correct pathway to challenge authority as opposed to utilisation of Rule 7(1), it simply means the point is without merit, particularly in light of the arguments raised about this being a settled area of our law.

The Rule 28(4) application brief background

[17] The applicant's action is based on an Instalment Agreement between the parties concluded on 09 June 2017. In terms of the agreement, Northend Showroom CC purchased a motor vehicle. The details of the motor vehicle are not necessary, suffice to say it was for the sum of R1 058 459-45. The vehicle was delivered to the respondent and this aspect was not placed in dispute. There are other ancillary conditions which are not relevant to the issues to be determined by this court. They will not be referred to.

[18] On the same day of the conclusion of the Installment Agreement, the respondent, in person, signed a suretyship in terms of which he bound himself as surety and co-principal debtor for payments due by Northend Showroom CC. The suretyship goes further to say that the obligations for which the surety (the respondent) binds himself could be for a limited amount which shall be limited

to all debts and obligations of whatsoever nature and howsoever arising from the agreement, which was then or which may thereafter become owing by, or claimable from Northend Showroom CC in respect of any cause of debt. Northend Showroom CC has since gone into liquidation. Following the outcome of the summary judgment application, and based on what the respondent pleaded, the applicant brought an application in terms of Rule 28(4). The respondent in turn, opposed the Rule 28(4) application and in addition brought the counter application to have the applicant declared a vexatious litigant and later sought a costs order against the applicant from the commencement of the matter.

Applicant's submissions

[19] Counsel submitted that the amendments sought are encapsulated in paragraphs 8.1. to 8.3⁵ as set out in the Notice of Amendment. Those paragraphs read as follows;

“8.1. During February 2019, the Plaintiff accepted an offer from BMW Bavaria for an amount of R350 000.00 for purchasing the vehicle 2017 BMW 320i M Sport AT (F30) LCI, with the Engine number: F[...] and Chassis Number: W[...] (hereinafter “the Vehicle”);

8.2. On 22 February 2019, the Plaintiff addressed a letter to the Defendant informing him that the Plaintiff will release the registration documents in respect of the above vehicle upon receipt of R350 000.00. Furthermore, the letter requested that the Defendant acknowledge liability in respect of the shortfall amount, by affixing his signature. A copy of the letter is attached hereto as Annexure “D1”;

8.3. On 20 February 2019, the Defendant addressed a letter to the Plaintiff advising the Plaintiff of his plans for the repayment of the shortfall amount. A copy of the letter is attached hereto as Annexure “D2”.”

⁵ CaseLines 0001-17.

[20] It was argued by counsel for the applicant that the case advanced by the respondent in resisting summary judgment was not in line with the defence that he advanced in his plea in the main case. The respondent, counsel for the applicant asserted, was a sole member of the Close Corporation (Northend) and that it was not in dispute that the letter dated 20 February 2019 was signed by Mr. Doola⁶. In that letter Mr. Doola undertook to make payment. The respondent could not distance himself from any of the two documents “D1” and “D2”, for it is clear, therefrom, that they both bear the same e-mail address that the parties had always utilised. It would be misleading to characterize the document as an acknowledgment of debt, it was submitted. That is because the document mentions at paragraph 4 thereof, that an acknowledgment of debt would be prepared. This could only have meant later. It reads as follows; “Please note that as previously indicated this amount will not be sufficient to settle the agreement and that you will be liable for the shortfall remaining on the account once the amount has been capitalised on the account.”

[21] Counsel submitted that although the document “D1”, was not signed by Mr. Doola, there would be no prejudice whatsoever in allowing the amendment particularly because the cause of action remains the same and no new cause of action would be created and introduced as argued by the respondent. She argued that in “D1” the entity Northend Showroom CC is not even mentioned, meaning the shortfall was that of Mr. Doola and nobody else’s.

[22] The court was then taken through the paragraphs of the respondent’s answering affidavit to the Rule 28(4) application and the founding affidavit to the counterclaim on issues with which the applicant did not agree or issues she

⁶ CaseLines 0001-22.

sought to clarify. I do not plan to go through each and every one of them because in parts the affidavits were repetitive. In the main it was disputed by counsel for the applicant that the document which the respondent referred to as an acknowledgment of debt was one. It was contended that there was no such indication, in clear text on the document. It was asserted that the letter which Mr. Doola seemed to disavow, was in fact requested by him and the response thereto equally was addressed to him. The contention by the respondent that the applicant was abandoning the cause of action based on a suretyship was disputed and rejected. It was disputed that a new cause of action will be introduced by the proposed amendment and that the particulars of claim will be excipiable. To the extent that the respondent was alleging that the applicant was introducing a new agreement, the court was referred to the non-variation clause in the suretyship agreement itself. Whereas the respondent contended that the proposed amendment in effect introduces a new agreement and that therefore the provisions of Rule 18(6) are applicable, the applicant takes the view that that Rule is not applicable. It was also denied that the leave to defend in the summary judgment application was granted at the doorsteps of the court, as argued by the respondent. The correct position it was argued, was that it was agreed to sometime ago. Lastly, it was denied that when the summary judgment application came before court, the respondent was represented by counsel as none was briefed at the time. However, the instructing attorney was present to oversee the hearing which was moved by counsel for the applicant. In addition, respondent cannot argue, it was submitted, that the applicant had vast resources and that he suffered financial loss in that the costs were reserved. Advocate Anmarli van der Merwe only appeared in an application to condone the late filing of heads of argument.

[23] The court was further taken through the plea of the respondent in particular the sub-paragraphs of paragraph 9. In summary, counsel highlighted that it was the respondent who approached the applicant to arrange the surrender and sale of the motor vehicle. The chronology of events was also set out. It was asserted that annexure “RD1” does not mention full and final settlement even though the respondent insists that the arrangement for payment was in full and final settlement. The email that the respondent sent to the applicant after effecting payment, does not say that as well, it was argued. Counsel submitted that opposition to the proposed amendment was frivolous and that the application should succeed.

[24] Counsel turned her attention to the respondent’s heads of argument. She referred to the portion therein where argument is made that the amendment if allowed would render the particulars of claim excipiable, in particular; that it was not clear whether the motor vehicle had been sold; if so when; the shortfall was not clear; whether the R350 000-00 was taken into account was also not clear and the lack of clarity whether the matter was proceeding on the basis of a suretyship or an acknowledgement of debt. After dealing with the submissions made in the heads of argument, counsel brought it to the court’s attention that the applicant’s heads of argument were three years out of time which meant that the practice directive had been totally disregarded and not complied with.

[25] Turning to the counter-application, counsel for the applicant accentuated the fact that it is not true that the applicant is a vexatious litigant; that the respondent alleges disregard of unnamed Rules by the applicant; that whereas the respondent is of the view that the applicant has unlimited resources, that is not true in that among others an offer was made to withdraw the counter-claim and a tender of R1 000-00 was made towards wasted costs. The applicant

prayed that the counter application be dismissed with costs on the scale as between attorney and client. The scale was influenced among others by the late filing of heads of argument, the non-compliance with the Rules as well as the submissions made about condonation.

Respondent's submissions

[26] Counsel for the respondent firstly had to deal with the reason why the respondent's heads of argument were filed out of time without seeking condonation for the late filing. They were filed on 15 July 2025. Counsel cited sloppiness on the part of the Candidate Attorney for the delay. She however apologized, took accountability and indicated that she had a responsibility to check the work of the Candidate Attorney but did not do so because she was immersed in preparations for the hearing.

[27] The proposed amendment if permitted will render the particulars of claim excipiable, it was argued on behalf of the respondent. Paragraph 10 of the particulars of claim, sets out that the respondent failed to timeously and punctually perform his obligations under the Instalment Agreement and Suretyship by falling into arrears with the monthly instalments, which arrears, the respondent despite demand failed and/or refused and/or neglected to pay⁷. The matter, it was submitted, has a long history with correspondence between the parties dating back to 2019 and 2020.

[28] Counsel submitted that the particulars of claim would be excipiable among others because;

28.1. It is not clear whether the motor vehicle was sold;

⁷ CaseLines 8-8.

- 28.2. If sold, it is not clear when the motor vehicle was sold;
- 28.3. It is not clear what the shortfall to be paid by the respondent would be;
- 28.4. It is not clear if the applicant took into account the sum of R350 000-00, in the event the motor vehicle was sold;
- 28.5. It is not clear if there is a shortfall to be paid in the event the sum of R350 000-00, paid by the respondent was received by the applicant;
- 28.6. It is not clear, in the event the vehicle has been sold, whether the applicant was still claiming the sum of R352 306-00;
- 28.7. It is not clear whether the applicant has received the sum of R350 000-00, from the sale of the vehicle;
- 28.8. It is not clear whether the applicant is claiming the arrear amount as per the particulars of claim or the shortfall as per the acknowledgment of debt;
- 28.9. It is not clear whether the applicant is proceeding on the surety agreement or the alleged acknowledgement of debt for the shortfall.
- 28.10. There was also mention of the R1 million rand purchase price of the vehicle.

[29] If the proposed amendment is allowed, it would beg an additional question, namely, whether the applicant is claiming specific performance, counsel further submitted. With reference to the Section 129⁸ notice or letter, counsel argued that the letter still referred to the sum of R1 million rand as the amount of indebtedness therefore there was uncertainty. She further made reference to Rule 18(4) and argued that the applicant's proposed amendment, if allowed, would fall foul of the provisions of the Rules⁹. In summary counsel

⁸ National Credit Act, 34 of 2005

⁹ **18. Rules relating to pleading generally**

argued that four things as accentuated by her, would render the particulars of claim excipiable; namely, the uncertainty as to whether the applicant is claiming arrears; the uncertainty whether the claim is for specific performance, the lack of clarity as to whether the motor vehicle has been sold and lastly whether the payment made by the respondent, in the sum of R350 000-00, has been taken into account.

[30] Since this is a claim for damages, counsel argued that the provisions of Rule 18(4) and 18(10), which in her view were applicable had not been complied with and that that confirms the possible excipiability of the particulars of claim, were the amendment to be allowed. In such circumstances an application for amendment should not be allowed in that with it the particulars of claim would make no sense it was submitted.

(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

...

(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for—

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of—

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars);

and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

[31] Counsel argued that the counter claim has its origins in the manner that the legal representatives of the applicant conducted themselves in the lead up to the summary judgment application. The applicant it would seem delayed replying to correspondence until on the eve of the summary judgment application. In addition, the Rule 28(4) did not include a tender of costs by the applicant instead it sought the respondent to pay the costs in the event the application was opposed. On 23 August 2021 the respondent served a notice opposing summary judgment together with an affidavit resisting it. On 25 August 2021, the respondent's legal representatives dispatched a letter to the other side, seeking clarity whether they were willing to grant leave to defend or if the application would be proceeding on 01 September 2021. The letter of 25 August 2021 went unanswered. Another letter to follow up the matter was sent on 27 August 2021 and it sought a response to previous correspondence by the close of business on 27 August 2021. There was a follow up telephone call and an undertaking was made to respond to the correspondence, none was forthcoming.

[32] On 30 August 2021 another letter was emailed to the legal representatives of the applicant advising among others that counsel had already been instructed and that costs should be tendered. The response from the applicant's legal representative only came on 31 August 2021. They advised that they will be granting the respondent leave to defend and that it was not necessary to instruct counsel as counsel for the applicant would be attending court. They were also advised that a draft order would be uploaded on CaseLines.

[33] Counsel argued that it took two years for the Rule 30 to be heard and for affidavits to be filed. She also indicated that the point *in limine* on lack of authority of the applicant's attorney was being abandoned and that costs in

respect thereof should be on the magistrate's court scale as the applicant simply did what she called "cut and paste" in preparation of the application. She reiterated that on face value the proposed amendment would be excipiable.

[34] Counsel for the applicant in reply stated that whereas it was submitted that there was no compliance with section 129 of the National Credit Act, it was her contention that the section was not applicable in the current case. Further, it was incorrect that the money demanded was the sum of a one million rand in that the letter of demand was clear as to the amount owed. The letter of demand on CaseLines¹⁰ was very clear about the amount being demanded and one of the e-mails was sent to the e-mail address of the respondent. Also, that the suretyship agreement¹¹ was clearly signed by the respondent and its terms are clear that the respondent is liable. The particulars of claim therefore if amended could not be excipiable. It is also clear that the respondent in terms of the surety agreement is liable for the costs of the litigation.

The law

The amendment

[35] The law as it pertains to amendments and the principles that generally underpin the approach to amendments is set out in *Commercial Union Assurance Co. Ltd v Waymark NO*¹², which is the go to case on amendments. It is therefore trite, in summary form that;

35.1. A court adjudicating an application for an amendment has a wide discretion which it must exercise judiciously;

¹⁰ CaseLines 8-35 and 8-42 paragraph 5.

¹¹ CaseLines 0001-28.

¹² *Commercial Union Assurance Co. Ltd v Waymark NO* 1995 (2) SA 73 (Tk)

- 35.2 The effect of the rule is that an amendment will always be granted unless if the application is made *mala fide*, would result in an injustice to the other side which cannot be compensated by an appropriate cost order;
- 35.3. There must be an explanation for the amendment and it must bring about a triable issue;
- 35.4. The amendment must bring about a proper ventilation of the dispute between the parties;
- 35.5. The amendment should not be refused so as to punish the applicant for negligence as an appropriate order of costs would be sufficient enough;
- 35.6. A mere opportunity to gain time by the applicant is no reason, on its own, to refuse the application;
- 35.7. If the amendment is not brought timeously, there must be a reason advanced for the delay.

[36] In *Affordable Medicines Trust v Minister of Health*¹³ the Constitutional Court had occasion to say the following about the principles governing amendments;

“The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “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.” These

¹³ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC) in paragraph [9]

principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.” (The underlining is my emphasis).

[37] The Supreme Court of Appeal in *Media 24 (Pty) LTD v Nhleko*¹⁴ weighed in on the approach to be adopted to amendments and the true determinant for purposes of decision making and said the following;

“In coming to its conclusion to refuse the application for amendment, the high court paid scant regard to the purpose of pleadings, which is to define the issues between the parties. Because the primary role of pleadings is to ensure that the real dispute between litigants is adjudicated upon, courts are loath to deny parties the right to amend their pleadings, sometimes right up until judgment is granted. An exception is made when the amendment is *mala fides* or will result in an injustice which cannot be cured by a costs order. Thus, the power of a court to refuse amendments is confined to considerations of prejudice or injustice to the opponent.” (The underlining is my emphasis.)

[38] Ranisc AJ in *De Kock v Olivier*¹⁵ reiterates the requirements in the judgment from a different angle, from which judgment I quote generously from paragraph 22 through to 24;

“22. In the passage from *Commercial Union v Waymark* endorsed in *Affordable Medicines Trust* (supra), the following further guidance is provided in relation to when an amendment will be permitted:

“In *Rosenberg v Bitcom* 1935 WLD 115 at 117 Greenberg J, as he then was, stated:

‘Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever

¹⁴ *Media 24 (Pty) LTD v Nhleko* [2023] ZASCA 77 at para 16.

¹⁵ *De Kock v Olivier* (21144/2022) [2024] ZAWCHC 351 (6 November 2024)

such an amendment facilitates the proper ventilation of the dispute between the parties.'

(My emphasis.) In *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C Henochsberg J held:

'An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay.'

Caney J stated in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A:

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.' ”

23. Further support for these requirements is found in the full bench judgment of this Court in *Vinpro NPC v President of the Republic of South Africa* [2021] ZAWCHC 261 in paragraph [25]:

“On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show prima facie that the amendment has something

deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.”

24. One of the circumstances where the other party would necessarily be prejudiced is where an amendment would render a pleading excipiable. Such an amendment ought not to be allowed, save in exceptional cases, where the balance of convenience or some other reason might render another course desirable. See e.g. *Cross v Ferreira* 1950 (3) SA 443 (C) at 450 E-G.”

Vexatious litigation

[39] Turning to vexatious litigation, such litigation is regulated by the Vexatious Proceedings Act, 3 of 1956, whose provisions guide the court on how and whether or not restrictions ought to be imposed on the institution of proceedings. Section 2(1)(b) of the Act states that:

“If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.”

[40] In *Bisset and Others v Boland Bank Ltd and Others*¹⁶ the court grappled with the meaning of “vexatious” in the context of proceedings, as opposed to a litigant, and gave a full and reliable definition. The issue of vexatious litigation again served before the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency and Others*¹⁷ 2017 (1) SA 645 (CC) in the context of abuse of process where *Bisset* was quoted with approval as follows;

“[19] What is “vexatious”? In *Bisset* the Court said this was litigation that was “frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant”. And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.

[20] Whether an application is manifestly inappropriate depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court. In *Beinash*, Mahomed CJ stated there could not be an all-encompassing definition of “abuse of process” but that it could be said in general terms “that an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”. The Court held:

‘There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

¹⁶ *Bisset and Others v Boland Bank Ltd and Others* 1991 (4) SA 603 (D).

¹⁷ *Lawyers for Human Rights v Minister in the Presidency and Others*¹⁷ 2017 (1) SA para 19 and 20.

‘When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.’

What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process’. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”

[41] In *Cohen v Cohen and Another*¹⁸ the court summarised the legal position and stated that in an application for someone to be declared a vexatious litigant, the applicant must meet two requirements: firstly, the applicant must show that the respondent has ‘persistently’ instituted legal proceedings and secondly, that the instituted proceedings have been ‘without reasonable grounds’.

[42] Lastly, the issue of costs has been well settled in our law. Costs fall within the discretion of the court. Costs follow the result. Sometime costs are reserved for later determination. Where the court is unsatisfied by the conduct of a litigant, it may award costs against that litigant on a higher than normal scale. Where egregious gross misconduct or negligence is detected, the court may even go to the extent of directing that costs be paid by the legal representative from his/her own pocket.

Application of the law to the facts

[43] An issue that need not detain this court further is the point *in limine* raised by the respondent, to the effect that the legal representative of the applicant

¹⁸ *Cohen v Cohen and Another* [2002] 4 All SA 21 (C); 2003 (1) SA 103 (C) (26 August 2002)

lacks authority. Although the point *in limine* was abandoned by the respondent, the abandonment came late in the day after the point had been fully argued before court by both parties.

[44] Counsel for the respondent, prior the abandonment, failed to refer the court to any authority for the proposition that the attorney of the applicant lacked authority or *locus standi*. This, counsel failed to do in the face of the applicant's submissions which were supported by formidable case law. This meant that the case by the respondent, the point *in limine*, was not meritorious. It follows therefore that the point *in limine* falls to be dismissed, abandonment notwithstanding, because it came after full arguments and most importantly during the reply stage of proceedings.

Application for amendment

[45] I now turn my attention to the main application, that of amendment of the particulars of claim. I will thereafter deal with the counter application. The proposed amendment seeks to introduce three paragraphs and two annexures "D1" and "D2" to the particulars of claim, as mentioned above.

[46] The terms of the Instalment Agreement concluded between the parties are common cause. In pleading to the particulars of claim, the respondent stated that in 2019, prior the liquidation of Northend Showroom CC, he approached the applicant and made an offer for them to buy back the vehicle that he previously purchased from them¹⁹. They reverted to the respondent and advised him in a letter or email annexed to the respondent's plea as "RD1", that the

¹⁹ CaseLines 19.4, paragraph 9.2 of the respondent's plea.

offer he made, to the applicant, for the buy-back of the vehicle, was acceptable.

“RD1” *inter alia* read as follows;

“We Auto Bavaria BMW will purchase the below mentioned vehicle at the sum of R350 000.00 providing that we get a paid up letter and the original natis upon payment for the below mentioned vehicle so it can be sold by Auto Bavaria BMW. Please advise on a settlement letter indicating the amount (R350 0000.00) with reference and banking details so we can make the funds available.”²⁰

[47] The respondent then pleaded, in his plea that following his acceptance of the offer, a sum of R350 000-00 was paid, as he puts it, “in full and final settlement”. The plea went on to say;

“The Defendant is not in any default of his obligations under the Instalment Agreement as this matter was finally and fully settled (two) years ago. There are no monthly instalments that are due, owing or payable by the Defendant based on the Suretyship agreement either, as the matter between the parties has already been settled”²¹.

[48] In the affidavit resisting summary judgment the respondent stated the following²²;

“The agreement with Bavaria Midrand was conditional on the settlement with the Plaintiff being in full and final. This was a necessary precondition, as the Plaintiff was listed as the Title Holder of the vehicle. Bavaria Midrand could not register the vehicle into its name until the Plaintiff consented to such registration and gave up its registration as a Title Holder for the Plaintiff to issue a “paid-up letter” to Bavaria Midrand and the Plaintiff.”

²⁰ CaseLines 19.5, paragraphs 9.3. and 9.4. of the respondent’s plea.

²¹ CaseLines 19-6, paragraph 9.9. of the respondent’s plea.

²² CaseLines 7-5 and 6, paragraph 9.2.

[49] This court is not going to immerse itself in issues that can only be determined by the trial court after evidence is tendered. This court therefore can only but comment or make observations for purposes of making a decision, without making any determination. The observation of this court is that there is nothing in the exchanges between the parties that says, “the settlement agreement (to pay R350 000, submit a settlement or paid up letter, and the exchange of NATIS documents) is/was conditional on whatever the parties agreed on it being in full and final settlement”.

[50] For purposes of the Rule 28(4), the proposed amendment which seeks to introduce paragraph 8.1. to the particulars of claim, if allowed, would introduce an issue which is in the respondent’s plea as well as the affidavit resisting summary judgment and is common cause to the parties. The common cause points are that the respondent approached the applicant and made an offer for the buy-back of the vehicle; the offer was accepted in writing with two conditions. The conditions were firstly, that the respondent must obtain a paid-up letter or settlement letter and secondly, that he must supply the original NATIS document so that a sale can be facilitated. In fact, in the affidavit resisting summary judgment the respondent deposed in relation to this issue as follows²³;

“9.4. Annexure RD1, being the letter from Bavaria Midrand is not disputed by the deponent. Nor is it disputed that the Plaintiff provided a “paid up letter” and original natis documents to Bavaria Midrand.”

[51] I find therefore that the objection to the proposed amendment by adding paragraph 8.1. to the particulars of claim, contents of which are common cause even on the respondent’s own version, is not meritorious.

²³ CaseLines 7-6 paragraph 9.4.

[52] The next objection by the respondent is aimed at the proposed paragraph 8.2. which if allowed, would read as follows;

“On 22 February 2019, the Plaintiff addressed a letter to the Defendant informing him that the Plaintiff will release the registration documents in respect of the above vehicle upon receipt of R350 000.00. Furthermore, the letter requested that the Defendant acknowledge liability in respect of the shortfall amount, by affixing his signature. A copy of the letter is attached hereto as Annexure “D1”.”

[53] Whereas the proposed amendment starts with paragraph 8.1. then moves to 8.2. and 8.3., the correspondence on record suggests that events did not unfold as chronologically set out in the paragraphs. The correct chronology of events is as set out below.

[54] The reason for opining as set out above, is that the dates tell that story. Set out in 8.1. is the story that an offer was accepted by the applicant. Following that acceptance, the respondent wrote a letter, although this is vehemently disputed by the respondent, to the effect that he was willing to make an offer to repay the shortfall hence “D2”, though set out in paragraph 8.3. Lastly, the applicant dispatched a letter to the respondent dealing with the release of the registration papers of the motor vehicle, payment of R350 000-00 and acknowledgement of liability for the shortfall by signing a document. Details in respect of this are set out in “D1”. What then followed was that the respondent wrote an e-mail to the applicant indicating that the R350 000-00 had been paid and that that payment was in full and final settlement.

[55] For purposes of context and to defer to chronological timelines, I will deal next with the proposed amendment aimed at introducing paragraph 8.3.

which in turn would introduce annexure “D2”. Paragraph 8.2. if allowed would read thus;

“On 20 February 2019, the Defendant addressed a letter to the Plaintiff, advising the Plaintiff of his plans for the repayment of the shortfall amount. A copy of the letter is attached hereto as Annexure “D2”.

[56] The picture thus far is that the respondent approached the applicant and tendered the surrender of a motor vehicle purchased from the applicant. The applicant then accepted that offer. This is set out in the sought introduction of paragraph 8.1. The respondent, bearing in mind this is in dispute, wrote a letter to the applicant proposing how the shortfall would be paid. This is set out in the proposed introduction of paragraph 8.3.

[58] From the pleadings, the basis for objecting against the introduction of paragraph 8.3. is that the offer to pay off the shortfall was made by Northend and not the respondent²⁴. Since this is at the core of the respondent’s objection, it can easily be dealt with by way of consequential amendments, if any. There will be no prejudice on the respondent, were the proposed amendment to be allowed in that the trial court is better placed to deal with the dispute. I find therefore that the objection to the sought introduction of paragraph 8.3. is without merit.

[59] Paragraph 8.2. which is sought to be introduced and in turn introduces “D1”, a letter written by the applicant to the respondent about the release of registration papers of the motor vehicle, payment of R350 000-00 as well signature of an acknowledgement of liability for the shortfall. As mentioned above, “D2” dated 20 February 2019, disputed as it is, was prepared after the

²⁴ CaseLines 7-8 paragraph 14

respondent had had a discussion with the applicant. The response to it is contained in “D2”. The interconnectedness between 8.1., 8.2. and 8.3. is undoubtedly undeniable. I find that the objection to the sought introduction of 8.2. is without merit. That will be clearer when I juxtapose the objections with the requirements set out in *Commercial Union Assurance Co. Ltd v Waymark NO*, which I proceed to do below.

[60] This court has a wide discretion which it must exercise judiciously. It will always permit an amendment unless if firstly, it is made *mala fide*. The respondent’s case is not that the application is made *mala fide*. The case is that the applicant seems to be relying on different causes of action; if allowed it will render the particulars of claim excipiable; that there was lack of clarity as to which cause of action was being relied on by the applicant and that the amendment was not in compliance with Rule 18(6). Secondly, that the amendment would result in an injustice which cannot be compensated by an appropriate cost order. It is also not the respondent’s case and/or argument that the amendment would result in an injustice.

[61] In resisting summary judgment and when raising the defences which the respondent contended were *bona fide*, the respondent indicated that they brought about triable issues²⁵. It is trite that one of the requirements for consideration in an application for amendment is that there must be an explanation for the amendment and that the amendment will bring about triable issues. It is ostensibly so that even on the respondent’s version there is a triable issue that will be introduced by the amendment and that as a result, there will be a proper ventilation of the dispute between the parties. Proper ventilation would

²⁵ CaseLines 7-5 paragraphs 8 and 9.4.

include the interpretation of “D1” and “D2” as well as common cause facts set out in the proposed introduction of paragraph 8.1. In so far as the explanation for the amendment is concerned, the applicant advances the explanation that the purpose is simply to amplify as opposed to replace the cause of action and that the cause of action remains the same. The amplification is in my view apparent in the assessment of what is at the core of the proposed amendment/s. Firstly, the common cause explanation that the respondent approached the applicant with an offer to surrender the vehicle, which offer was accepted. Secondly, the letter by the applicant to the respondent dealing with registration documents of the motor vehicle, payment of the R350 000-00 as well as the signing of certain documents. Lastly, the offer to pay the shortfall, though disputed.

[62] I conclude that the objection to the proposed amendment which will introduce paragraphs 8.1., 8.2. and 8.3. is without merit, for reasons set out above. The result is that the application in terms of Rule 28(4) must succeed. I will deal with the costs aspect of the Rule 28(4) application later, as I turn to the counter claim or counter application.

Counter application

[63] The counter-application or counterclaim by the respondent has its origins in the application for summary judgment. The respondent makes the following case;

63.1. After the summons were served on the respondent, he entered an appearance to defend and thereafter pleaded on or about 31 March 2021;

63.2. On 23 April 2021 the applicant launched an application for summary judgment;

63.3. The affidavit resisting summary judgment was filed on 23 August 2021;

63.4. On 31 August 2021 the respondent filed heads of argument in the application for summary judgment which was set down for hearing on 01 September 2021;

63.5. The respondent makes the following point²⁶;

“The applicant did not file heads of arguments herein, demonstrating that there was never an intention to pursue the matter, and further that the application for summary judgment was brought solely for the purpose of accumulating costs.”

63.6. That it was six months later and after the respondent was granted leave to defend, that the applicant filed the application to amend the particulars of claim,

63.7. That he had to incur legal fees when pleading, when opposing the application for summary judgment, the drafting of opposing papers, briefing of counsel and attending court in circumstances where the applicant failed to tender costs;

63.8. That the applicant is a large corporate entity with unlimited resources to fund unending litigation on one hand and on the other that he, the respondent, was in no similar position. The respondent asserts that the applicant by launching the application for summary judgment as well as the application for leave to amend the particulars of claim, wants to deplete his resources and force him into a settlement;

63.9. Further, that he needs to be shielded from the applicant’s unmeritorious and vexatious litigation as well as the non-compliance with the Uniform Rules of Court;

[64] The respondent reasons that in launching the application for summary judgment as well as the application for leave to amend the particulars of claim,

²⁶ CaseLines 3-8 paragraph 10.1.6.

the applicant is litigating vexatiously, especially because the applicant, it was argued, litigated without a tender for costs. That is the reason why, the court is asked to declare the applicant a vexatious litigant.

[65] In a subsequent notice of counter-application, dated 01 June 2022, the respondent sought the following, orders;

- “1. In the event of the Court granting an order in terms of rule 28(4), the applicant is to pay the respondent’s costs on an attorney and client scale from inception of the litigation up to granting of the order in terms of rule 28(4);
2. The applicant to pay the costs of this application;
3. Further and/or alternative relief.”

[66] The applicant contends that the respondent has failed to demonstrate that circumstances surrounding the summary judgment application and the subsequent filing of an application for leave to amend is an abuse of court processes and therefore vexatious. The applicant is of the view that the respondent has not placed facts before court to show that the litigation by the applicant is unmeritorious.

[67] It was necessary to proceed by way of summary judgment, it is contended by the applicant, so that the respondent could place under oath his defence, if any. The fact that the respondent insisted that whatever payment he made was in full and final settlement is evidence, it was argued, of the fact that the application for summary judgment was justified. It cannot be said that the application was vexatious. The same goes for the application for an amendment which was necessitated by the fact that the respondent insists on denying knowledge of payment of the shortfall.

Discussion

[68] It must be noted that as indicated above, at the center of the respondent's application to have the applicant declared a vexatious litigant is the launching of the summary judgment application. The respondent argues that the conduct of the applicant in launching the application and at the last minute agreeing to grant the respondent leave to defend, together with failure to tender costs, amounts to vexatious litigation.

[61] What is clearly apparent is that there are no multiple cases involving the same parties. There is only one case, under the case number 5393/2021. Distilled from *Bisset* and *Lawyers for Human Rights v Minister in the Presidency and Others*, is that there are two requirements, namely, firstly, that one must persistently institute legal proceedings and secondly that such proceedings should be without reasonable or probable cause. There are other requirements such as not bringing proceedings in good faith, bringing proceedings to annoy or embarrass the opponent, initiating proceedings that are not likely to bring about a procedural result and lastly bringing proceedings that amount to an abuse of process which process the court guards jealously.

[62] In this matter there is no persistent institution of legal proceedings. In the context of this matter, the launching of an application for summary judgment cannot by any logic be said to be persistent litigation nor can it be said that the application was launched without reasonable grounds. This is because it extracted from the respondent that which on his own version he described as a triable issue and it led to leave to defend being granted. The application was therefore not *mala fide*, annoying or meant to embarrass the respondent. The application led to a procedural result, namely, the order for leave to defend by

Phahlane J on 01 September 2021. It follows that the launching of the summary judgment application was not vexatious.

[63] The respondent extended the ambit of vexatious litigation to the application for leave to amend, the main application. I have above dealt with the objection to the application for leave to amend the particulars of claim. I have gone further and found that the objection was not meritorious. It follows as a matter of logic that the application for leave to amend cannot be vexatious if the objection thereto was without merit and leave to defend was granted.

[64] The other reasons advanced as part of the respondent's contention that a case has been made for the applicant to be declared a vexatious litigant, such as the submission that the applicant is a corporate entity with unlimited resources, which is a fact. It is also a fact that the respondent had to incur fees in drafting pleadings and opposing papers in the summary judgment application. These two facts whether viewed individually or together, do not support nor do they bolster the respondent's contention that the applicant is a vexatious litigant. They are irrelevant for purposes of determining if a litigant is vexatious.

[65] The remaining two points of argument, firstly, that the applicant should be declared a vexatious litigant because in launching the application for summary judgment as well as the subsequent application for leave to amend the particulars of claim, the applicant was intent on depleting his resources and thus force him into settlement. Secondly, that the applicant should be declared a vexatious litigant so that he, the respondent, can be shielded from the applicant's non-compliance with the Rules, are totally nonsensical. A litigant cannot seek to be shielded from his opponent's non-compliance with the Rules by an order declaring the opponent a vexatious litigant. The two have nothing to

do with each other. Similarly, a litigant has to finance his/her own litigation. A litigant who wishes to pursue a particular cause of action in the course of litigation, which is permitted in law and which is not made in bad faith, is at liberty to do so without considerations of resources of his/her opponent. It would amount to an absurdity were a court to declare a litigant vexatious simply because that litigant is a corporate entity with unlimited resources, the litigation has the effect of depleting the resources of the opponent and when the litigant does not comply with the Rules the opponent be protected from non-compliance by declaring that litigant a vexatious litigant. There are sufficient safeguards in the Uniform Rules of Court to adequately deal with non-compliance with the Rules. Declaring a litigant vexatious is not one of them.

[66] The facts that the respondent relies on, as well as case law, fall short and do not support the contention that the applicant is a vexatious litigant and should be so declared. It follows that the application must fail.

[67] As part of the counter-application, the respondent prayed that costs be awarded against the applicant “*to pay the respondent’s costs on an attorney and client scale from inception of the litigation up to granting of the order in terms of rule 28(4)*”. I will deal with the costs aspect when I deal with the costs of the various applications as I do below.

Costs

[68] The first award of costs to consider are those associated with the point *in limine* raised by the respondent. The point *in limine* was abandoned very late in the proceedings after it had been fully argued. Counsel for the respondent submitted that the respondent can be mulcted with costs but on a magistrate’s court scale, reason being that the applicant simply did a “cut and paste”, in

preparing the application. The respondent's challenge of the authority of the applicant's legal representative, is an area of the law that is well settled and was without merit. I have already found that the challenge, though abandoned with a halfhearted tender of costs on a magistrate's court scale after full argument, was without merit. I am of the view that a cost order on attorney and client scale is justified.

[69] With regard to the application in terms of Rule 28(4) the finding made by this court is that the applicant be granted leave to amend and the grounds advanced in opposing the application are without merit. What remains is the determination of the costs aspect. As a general rule costs follow the result although there are certain exceptions. One such exception being reserved costs which I will get to shortly. In the notice of application for leave to amend, the applicant sought costs against the respondent in the event the application was opposed. Counsel for the applicant argued that the respondent's opposition to the application was frivolous and counsel for the respondent argued that both the application for summary judgment and the application for leave to amend are both frivolous and vexatious. Each party is seeking costs against the other on the punitive attorney and client scale.

[70] Costs in an application for leave to amend are ordinarily borne by the applicant in terms of Rule 28(9). Since the application is opposed and since both parties are seeking an award of costs against the other on a punitive scale, the court must look at and make a determination whether opposition of the application was warranted or put differently, whether or not it was frivolous or vexatious. The bases for the objection must be considered in order to make that determination, as I do below.

[71] The respondent contends that the amendment, if allowed, would render the particulars of claim excipiable for the following summarised reasons;

71.1. It is unclear if the motor vehicle was sold;

71.2. It is unclear when the motor vehicle was sold;

71.3. It is unclear what the shortfall to be paid is;

71.4. It is unclear if the applicant took into account the R350 000-00 in the event the motor vehicle was sold;

71.5. It is not clear if there is a shortfall to be paid by the respondent if the R350 000-00 was received;

71.6. It is unclear if the applicant still seeks the full R352 306-00 if the motor vehicle a been sold;

71.7. It is unclear if the R350 000-00 was received by the applicant from the sale of the motor vehicle;

71.8. It is unclear if the applicant was proceeding on the arrears as per the particulars of claim or the shortfall amount as per the proposed amendment.

71.9. It is unclear if the applicant was proceeding on the surety agreement or the acknowledgment of debt for the shortfall.

[72] In *Gcanga v Mutual Insurance Association Ltd*.²⁷, the court found, in the context of unreasonable objection to the proposed amendment, that the objection was unwarranted and unreasonable, the objecting party was then

²⁷ *Gcanga v Mutual Insurance Association Ltd* 1979 (3) SA 320 (E)

ordered to pay costs of the application for leave to amend, albeit on a party and party scale. The principle is clear, where an objection is found to be unwarranted and unreasonable, the objecting party will be mulcted with costs. The scale of costs to be awarded will depend on the facts of each case and whether a punitive scale is warranted.

[73] The nine grounds on which the respondent's objection to the proposed amendment is anchored, all of them suggest that the amendment if allowed will bring about uncertainty in some form, to the particulars of claim and the cause of action by extension. There are three areas of uncertainty, namely, sale of the vehicle, the shortfall as well the cause of action.

Sale of the motor vehicle

[74] The respondent raised five areas of uncertainty under the above heading;

74.1. It is unclear if the motor vehicle has been sold;

74.2. It is unclear when the motor vehicle was sold;

74.3. It is not clear if the applicant took into account the R350 000-00 in the event the motor vehicle was sold;

74.4. It is not clear if the applicant still seeks the full R352 306-00 if the motor vehicle was sold;

74.5. It is not clear if R350 000-00 was received by the applicant from sale of the motor vehicle.

[75] It is common cause that the applicant is proceeding against the respondent on the basis of a suretyship. The uncertainty or lack of clarity which the

respondent contends exists about sale of the motor vehicle, if it is indeed uncertainty or lack of clarity, was in existence when the respondent pleaded to the particulars of claim and also when the respondent prepared an affidavit resisting summary judgment. The lack of clarity or the uncertainty that the respondent relies upon as the basis for objecting to the proposed amendment and which the respondent contends will render the particulars of claim excipiable, is therefore contrived and lacks merit. It is raised at this stage for no other reason other than to oppose the application for leave to amend the particulars of claim.

The shortfall

[76] The respondent raised three areas of uncertainty about the shortfall which are that;

76.1. It is unclear what the shortfall to be paid is;

76.2. It is not clear if there is a shortfall to be paid by the respondent if the amount of R350 000-00 was received by the applicant;

76.3. It is unclear if the applicant was proceeding against the respondent on the arrears as per the particulars of claim or the shortfall as per the acknowledgment of debt.

[77] The respondent pleaded emphatically in his plea that the sum of approximately R350 000-00, which was paid by, him was in full and final settlement. In other words that there was no shortfall and that there never could have been because of payment of the R350 000-00. The parties' pleaded cases show that there was a sum of R11 000-00 which paid by the "debtor". The respondent pleaded in turn that the amount could very well have been

overpayment by the liquidators. At the core of the amendment sought by the applicant to introduce communication between the parties, paragraphs 8.2. and 8.3, is the contention that the respondent was at all material times aware about existence of a shortfall, hence “D1” and “D2” mentioned in the notice of application for amendment. To seek to introduce knowledge of existence of the shortfall is about amplification of the claim by the applicant and is not prejudicial to the respondent. It does not render the particulars of claim excipiable.

Surety agreement or acknowledgment of debt?

[78] The last point on which the respondent relies in arguing that the amendment if allowed would render the particulars of claim excipiable, is that it is unclear if the applicant was proceeding on the surety agreement or the acknowledgment of debt for the shortfall. The lack of clarity is contrived. There is no acknowledgment of debt as far as I understand the facts of this case. The applicant’s case has been and remains, as its basis, the suretyship. The contention that the particulars of claim would be excipiable because, among other reasons, it is not clear if the cause of action is the suretyship or the acknowledgment of debt, in circumstances where there is no acknowledgment of debt concluded between the parties, leads me to conclude that opposition of the Rule 28(4) application, on this ground, is frivolous and vexatious.

[79] In *Hart v Broadacres Investments Ltd.* 1978 (2) SA 47(N) Hefer J had occasion to say the following on the issue of punitive costs orders in applications for amendment;

“Naturally, as has often been stated, the grant of an amendment is an indulgence to the party requiring it, which entails that he is generally liable for all the costs occasioned by or wasted as a result of the amendment. These costs have sometimes been held to include ‘the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous’(per van Winsen AJ (as he then was) in *Myers v Abramson* 1951 (3) SA 438 (C) at 455... In other cases, however, the costs of unsuccessful opposition were not so included and the unsuccessful objector was ordered to pay the costs occasioned by his opposition even though it was not considered unreasonable or vexatious or frivolous (See e.g. *Wahlen v Gramowsky* 1924 SWA at 52; *Moolman v Estate Moolman* 1927 CPD 27 at 29)...It seems to me, when it comes to deciding in any particular case whether the party to whom an indulgence is granted is to pay the costs of opposition, that the recognition of a single criterion for liability (such as the reasonableness of the opposition) tends to hamper the exercise of the unfettered judicial discretion which a court has in its award of costs. The exercise of that discretion is, after all, essentially a matter of fairness to both sides (*Gelb v Hawkins* 1960 (3) SA 687 (A) at 694; *Ward v Sulzer* 1973 (3) SA 701 (A) at 706), and a criterion which may be useful in one case may in other cases not have the desired fair effect.”

[80] The Constitutional Court in *Mkhatshwa and Others v Mkhatshwa and Others*²⁸, per Khampepe J, stated the following with regards to punitive costs on the attorney client scale:

“Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted. In SARB, [being a reference to the matter of *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC)], this Court affirmed the following guiding principles in relation to punitive costs, elucidated by the Labour Appeal Court in *Plastic Converters Association of SA*: ‘The scale of attorney and client is an extraordinary

²⁸ *Mkhatshwa and Others v Mkhatshwa and Others* (CCT 220/20) [2021] ZACC 15; 2021 (5) SA 447 (CC); 2021 (10) BCLR 1182 (CC) (18 June 2021)

one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably, vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”.

[81] In this matter the respondent raised a point *in limine* that lacked merit in that objection was raised against the legal representative of the applicant. It was argued that the legal representative lacked the requisite authority to act on behalf of the applicant. The point was later abandoned by counsel for the respondent and costs were tendered on the magistrate’s court scale after the point was fully argued. I may add that it was after it was clear that the wrong procedure to challenge authority was used and no authority was tendered by the respondent for the chosen procedure. The abandonment came when it was clear that the respondent was going to lose the *in limine* point. This is deserving of censure.

[82] The application for leave to amend brought by the applicant was opposed by the respondent. The proposed amendments as well as the grounds for opposing the application were vigorously examined and considered by this court. This court found that some of the proposals were common cause and that in total the respondent would not be prejudiced were the amendments to be allowed. The grounds for opposing the application for leave to amend were found to have been contrived, frivolous and vexatious.

[83] Pretorius AJ, relying on *Gcanga* said the following about the reasonableness of objection to the proposed amendment and the effect or influence it has on costs;

“[18] In the matter of *Gcanga v Mutual Insurance Association Ltd*, it was held that it is implicit in the procedure prescribed in Rule 28 that an objection to a notice to amend must be reasonably and responsibly taken. If an objection is taken merely to inconvenience the litigant seeking the amendment, or in an attempt to compel the amending party to incur the costs of an application to Court, when the opposing party has no real grounds for objecting and either does not appear in Court at all to oppose the application or appears and raises some frivolous objection, then the Court will be likely to order the objecting party to pay all the costs in respect of the application. The fact that the opposition to a proposed amendment is reasonable does not necessarily entitle the opposing party to an order for costs. Unsuccessful opposition to a proposed amendment may result in the objecting party being ordered to pay the costs notwithstanding the fact that the opposition was reasonable. Eksteen J also stated the following:-

‘On the other hand, I do not want to be understood as to mean that as a general rule costs in such applications will follow the result, or that in certain circumstances the respondent might not be ordered to pay the costs of opposition, or even that the opposition might be able to have been so reasonable as to warrant an order that the applicant pay all the costs. Each case in my view must depend on its own merits and the discretion of the Court to make an order which is fair in all the circumstances must remain unfettered.’”

[84] I find that it was unreasonable to oppose the application for leave to amend and that a cost order on a punitive scale is justified.

[85] The application to declare the applicant a vexatious litigant lacked merit. The respondent failed to demonstrate that he was entitled to the relief sought, given the requirements of statutes, case law and established legal precedence. It therefore lacked merit and has hallmarks of a kneejerk reaction. It has to fail and is deserving of a punitive cost order.

[86] Lastly, the respondent sought a costs order against the applicant from commencement of the matter up until the Rule 28 (4) application, on a scale as between attorney and client. I have to confess that I have never heard of such relief sought during hearing of an interlocutory application. The respondent could not provide any authority for such a far reaching and unprecedented relief he sought. In addition, costs of the summary judgment application were reserved for later determination. It is not clear from the record if this was by agreement or if they were argued but reserved. Be that as it may, none of the parties, particularly the respondent, being the person seeking relief, clarified what the correct position was, i.e. whether the costs were reserved by agreement or after they were argued but were nevertheless reserved. What is clear however is that counsel for the applicant attended court.

[87] In the result, and for the reasons stated above, I find that the point *in limine* must fail, the application for leave to amend must succeed, the counter application to have the applicant declared a vexatious litigant must fail and that the respondent must pay the costs on a punitive scale, that of attorney and client.

Order

[88] The following order is made;

1. Leave to amend the applicant's particulars of claim in accordance with the notice to amend in terms of Rule 28(1) of the Uniform Rules of Court dated 24 January 2022 is granted with costs on the scale as between attorney and client.

2. The respondent's counterapplications are dismissed with costs on the scale as between attorney and client.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant : ADV. S F FISHER-KLEIN,

Instructed by : VELILE TINTO & ASSOCIATES INC.

PRETORIA

For Respondent : ADV. R ANDREWS,

Instructed by : COMBRINK NEL AND ASSOCIATES

RANDBURG

Date of judgment: 24 AUGUST 2026 - This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to

SAFLII. The date and time of hand down is deemed to be 10:00 on 24 AUGUST 2026.