

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2025-019248

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

GARVEY AJ

9 SEPTEMBER 2026

In the matter between:

AVERDA SOUTH AFRICA (PTY) LTD

APPLICANT

and

AON SOUTH AFRICA (PTY) LTD

FIRST RESPONDENT

DIRK WIEHMAN

SECOND RESPONDENT

In re:

AVERDA SOUTH AFRICA (PTY) LTD

PLAINTIFF

and

EMERALD RISK TRANSFER (PTY) LTD

FIRST DEFENDANT

SANTAM LIMITED

SECOND DEFENDANT

GUARDRISK INSURANCE COMPANY LIMITED

THIRD DEFENDANT

CHARTER RISK (PTY) LTD

FOURTH DEFENDANT

AON SOUTH AFRICA (PTY) LTD

FIFTH DEFENDANT

This judgment is handed down by the Judge whose name is reflected herein, and is submitted electronically to the parties or their legal representatives by email. It is further uploaded to the electronic file of this matter on CaseLines. The date of hand-down is deemed to be 9 September 2026.

ORDER

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1. The applicant, Averda South Africa (Pty) Ltd, is granted leave to amend its particulars of claim in accordance with its notice of intention to amend dated 25 April 2025, save that the references to the “*first to fourth plaintiffs*” in the proposed paragraphs 44 and 51 shall read “*first to fourth defendants*”.
 2. The applicant shall deliver the amended pages of its particulars of claim within 15 days of the date of this order.
 3. The applicant shall pay the costs of the application for leave to amend of the first and second respondents, Aon South Africa (Pty) Ltd and Mr Dirk Wiehman, including the costs of their opposition, with counsel’s fees on scale B.
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JUDGMENT

GARVEY AJ

Introduction

- [1] The plaintiff in a pending action wishes to amend its particulars of claim. Two of the six defendants object. The plaintiff applies for leave to amend under rule 28(4) of the Uniform Rules of Court. This judgment decides that application.

- [2] The applicant is Averda South Africa (Pty) Ltd (“Averda”), the plaintiff in the action. Averda carries on business in waste management, including the operation of landfill facilities. In the action it claims R 8 566 668 under a property damage and business interruption insurance policy.
- [3] The first respondent is Aon South Africa (Pty) Ltd (“Aon”), the fifth defendant in the action. Aon was Averda’s broker at the relevant time. The second respondent is Mr Dirk Wiehman, the sixth defendant. He is a broker employed by Aon. He administered the relevant claim on its behalf. Like the papers, I refer to the respondents together as “*the Aon defendants*”.
- [4] The first to fourth defendants in the action are Emerald Risk Transfer (Pty) Ltd, Santam Limited, Guardrisk Insurance Company Limited and Charter Risk (Pty) Ltd. The particulars of claim describe them as the insurers under the policy. I call them “*the insurer defendants*”. They did not object to the proposed amendment. They took no part in this application.
- [5] By notice of motion delivered on 26 May 2025, Averda asks for an order in these terms:
- “1. *Granting the applicant (plaintiff in the action) leave to amend its particulars of claim as set out in the notice of intention to amend dated 25 April 2025.*
 2. *Directing that the costs of the application for leave to amend be costs in the cause of the action.*
 3. *Further and alternative relief.”*
- [6] The Aon defendants ask for the dismissal of the application with costs. In the alternative, they ask that Averda pay the costs of the application even if it succeeds.

The action

- [7] For the year 1 April 2022 to 31 March 2023 Averda’s assets and business interruption risks were covered by an “*all risks*” property damage and business

interruption policy. Averda pleads that the policy was concluded on or about 14 May 2022. Emerald Risk Transfer signed it on behalf of the insurers for their respective proportions. Aon was the appointed broker and earned commission under the policy.

[8] Averda pleads that on or about 19 February 2023 torrential rain damaged structures at its property at Vlakfontein Farms, Sedibeng, Vereeniging. It claims the cost of reinstating its property is an amount of R 8 566 668.

[9] The two paragraphs of the particulars of claim at the centre of this application read as follows:

“23. On or about 19 February 2023, the property of the plaintiff situated in Vlakfontein Farms, Sedibeng, Vereeniging (‘the property’), was damaged as a result of torrential rains. In this regard specifically the cells, which acted as reservoirs, the property were damaged (‘the insured event’.)

24. The property included the cement cells, which acted as a reservoir and was designed to be situated in the open and subject to the weather elements.”

[10] The syntax of paragraph 23 is plainly garbled. I quote it as it stands because as it is stated becomes relevant later.

[11] The pleaded definition of “*Insured Property*” in the policy contains a list of exclusions. Exclusion 1.16 excludes “[d]ams, dam walls, dam contents and reservoirs, other than storage tanks”.

[12] Averda pleads that it reported the insured event and its claim to Aon, represented by Mr Wiehman, during 2023. It pleads that the claim “*has not been finalised*”. No repudiation is pleaded. Averda’s letter of demand of 6 February 2025 records that no outcome and no repudiation had by then been conveyed to it.

- [13] The particulars advance two sets of claims. The first is against the insurer defendants, for payment of the claimed amount under the policy. The second, in the alternative, is against the Aon defendants. It has two legs. The first leg is in delict, as Averda's broker and agent, the Aon defendants, owed it a duty of care, which they breached by failing to report the claim to the insurers, to supply the information required, to prosecute the claim, and to notify Averda of its outcome. The second leg, in the further alternative, is in contract, being a mandate agreement concluded on or about 8 April 2022 by Mr Nassif on Averda's behalf, partly in writing an email exchange annexed to the particulars with tacit, alternatively implied, terms to like effect, and breaches mirroring the delictual case.
- [14] One feature of the chronology matters. The pleaded policy terms include a time bar. A claim is not payable if 24 months have elapsed since the occurrence, unless the claim is the subject of pending legal action. The loss event was on 19 February 2023. The 24 months were therefore to expire in February 2025. The demand went out on 6 February 2025. Summons was issued on 13 February 2025 and served within days. Averda's attorneys say that the particulars of claim were settled under that time pressure.

The exceptions

- [15] Neither set of defendants pleaded. Both excepted.
- [16] The Aon defendants excepted on 26 March 2025, on three grounds. First, the policy excludes reservoirs from the Insured Property. On Averda's own pleading the damaged cells "*acted as reservoirs*". The damaged property was therefore not insured, and if it was not insured, the brokers' alleged failures caused Averda no loss. Second, the delictual claim pleads no facts to sustain wrongfulness. Third, the mandate claim does not say whether the unwritten part of the mandate is oral or tacit, and pleads no facts to show that the alleged breaches caused the loss.
- [17] The insurer defendants excepted on 2 April 2025, on one ground only, being the reservoir exclusion. On the face of the particulars, they said, the claim is for

damage to property which is not Insured Property, and so no cause of action is disclosed against them.

The proposed amendment

- [18] Averda did not oppose the exceptions. Instead, on 25 April 2025, it delivered a notice of intention to amend. The notice has thirteen items. They do four things.
- [19] First, items 1 and 2 delete the words “*which acted as reservoirs*” and “*which acted as a reservoir*” from paragraphs 23 and 24. The damaged property remains pleaded as cement cells, designed to be situated in the open and subject to the weather.
- [20] Second, items 4 to 9 rework the delictual claim. As amended, the particulars plead that the duty of care flows from the relationship between Averda and the Aon defendants as its broker and agent, that the Aon defendants had to perform their duties with the reasonable care and skill expected of a professional insurance broker, that they failed to do so, that their conduct was negligent and wrongful, and that, had they performed their duties, the insured event “*would have been indemnified*” by the insurer defendants.
- [21] Third, items 10 to 12 make matching changes to the mandate claim, a term requiring the care and skill of a professional insurance broker, its breach, and the same causation allegation.
- [22] Fourth, items 3 and 13 add a rider to the monetary claims: “*alternatively an amount to be established at the trial*”.
- [23] The proposed paragraphs 44 and 51 refer to the “*first to fourth plaintiffs*”. That is a patent slip for “*first to fourth defendants*”. Argument proceeded on that footing. The order corrects it.

The objection and the opposition

- [24] The insurer defendants did not object, within the rule 28(2) period or at all. Their exception had rested only on the reservoir wording.

[25] The Aon defendants objected on 12 May 2025, timeously. The objection has two grounds. The first is that the amendment does not deal with the second and third grounds of their exception, so the particulars “*remain excipiable*”. The second is want of good faith. It is put this way:

“24. *The deletion proposed by the plaintiff in its amendment is contrived to escape the first ground of exception as opposed to it being in good faith. The plaintiff would have provided fact instructions and the particulars of claim would have been drawn on those instructions. In consequence the plaintiff made the allegation that the damaged property was a reservoir - because that is what it was - and now seeks to retract the allegation because of the first ground of exception.*

25. *This is impermissible and in bad faith and the amendment should be refused on this basis as well.*”

[26] The objection obliged Averda to seek leave. It applied on 26 May 2025, within the rule 28(4) period. Ms van Zyl, Averda’s attorney, deposed to the founding affidavit. Her explanation is brief. The particulars were prepared under time constraints, to beat the contractual time bar that “*ran out in February 2025*”. The reference to reservoirs “*was incorrectly inserted*”. It “*obviously should not have been included*”, and it was an error. The evidence foreshadowed for trial is that the facility was not used as a reservoir. The further amendments plead additional facts to cure the second and third grounds of exception. She points out that no defendant has yet pleaded, so no real prejudice can arise.

[27] Mr Charbel Keyrouz, Averda’s managing director, confirmed the founding affidavit. He says the reference to reservoirs “*was clearly inserted as an error*” as a result of the time constraints, and adds:

“*The use of the facility will be demonstrated at the trial of the matter, that it did not act as reservoirs.*”

[28] The answering affidavit was deposed to by Mr Clive Rumsey, the Aon defendants’ attorney. It advances two grounds. The first being that the amended pleading remains excipiable, whether it does is “*a matter for legal argument*”,

and the prejudice “*subsists in the defendants having to deal with an excipiable pleading*”. The second ground is that Averda has shown no triable issue. The deletion “*carries with it the recognition that ‘Reservoirs’ do not enjoy insurance cover and this is destructive of the plaintiff’s case. Otherwise why remove it.*” There is “*no actual explanation even a terse one in relation to the type of property that was damaged*”. The deletion leaves a description, “cells”, said to be “*meaningless*” and to bear “*no correlation to the Insurance Policy*”. The failure to explain what the insured property comprises is said to lead “*to a conclusion that the Amendment is not bona fide*”. On costs, the Aon defendants ask for dismissal, and failing that, that Averda pay the costs as it seeks an indulgence.

- [29] In reply, Ms van Zyl says the explanation of the error “*is not seriously attacked*”. The Aon defendants “*cannot produce any facts to demonstrate that this was in fact not an error*”. Ms Samantha Malatji, an insurance specialist employed by Averda, confirmed the founding affidavit and the prejudice Averda would suffer if leave were refused.

The issues

- [30] The joint practice note states the issues, which include whether Averda has demonstrated a basis for the amendment, whether the objection has merit, and the appropriate relief and costs, including the scale. Three questions answer them. Is the deletion of the reservoir references *bona fide* and supported by a triable issue? Would the amended particulars nonetheless remain excipiable? And what costs order is fair?

The legal framework

- [31] The principles are settled. The starting point remains *Moolman v Estate Moolman* 1927 CPD 27 at 29:

“[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.”

[32] The Constitutional Court has endorsed that approach. Amendments serve the proper ventilation of the real dispute. They are refused where they are sought in bad faith, or where they would cause an injustice to the other side which costs cannot cure. (See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 9. See also *Media 24 (Pty) Ltd v Nhleko*, an unreported judgment of the Supreme Court of Appeal, Case No 109/2022 (29 May 2023) at para 16, on which the applicant relied.)

[33] An amendment is nonetheless an indulgence, not a right. A party that seeks to change its pleaded case must explain itself, and must show that the change deserves adjudication. The formulation in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 640H-641A is instructive:

“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.”

[34] The Aon defendants relied on the summary in *Commercial Union v Waymark N.O.* 1995 (2) SA 73 (Tk.) An applicant for an amendment must show, amongst other things, a triable issue, that the other side will suffer no prejudice which cannot be cured, how the need for the amendment arose and why the pleading was originally formulated as it was, the reason for any delay, and that the grounds of objection are not sustainable (at 77F-I.) These are useful guidelines for the exercise of the discretion. They are not an exhaustive statutory checklist.

[35] Where the objection is that the pleading, as amended, would be excipiable, the principle is that a court will not grant an amendment that would render the pleading excipiable. (See *Cross v Ferreira* 1950 (3) SA 443 (C) at 449 and *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at 258H-259A, both cited by the applicant.) But the enquiry at this stage is a limited one. An application for leave to amend is not the hearing of an exception. In my view, leave to amend is refused on this ground only where it is clear that the amended

pleading would be excipiable. Where the point is fairly arguable either way, the better course is to grant the amendment and to leave the objecting party to except if so advised. The point of law is then decided where it belongs on exception, on full argument. (Compare *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at para 3, where it was stated that the exception procedure exists to weed out claims that are bad in law.)

The deletion: good faith and a triable issue

- [36] Mr Govender SC, appearing for the first and second respondents, opened with the reminder that litigation is not a game, and that nothing should be pleaded without a reasonable factual foundation. (See *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at para 197 and *Mzayiya v Road Accident Fund* 2020 JDR 1960 (ECB) at para 85, both relied on by the respondents.) Both propositions are sound. Neither decides this application. The question is whether Averda's corrected description of its property is an honest correction supported by a triable issue, or a tactical retreat with nothing behind it.
- [37] The Aon defendants' central submission is the rhetorical question in the answering affidavit. The property did not change, only the label did, so why delete the label unless it was true? The inference does not hold. If a descriptor in a pleading is wrong, deletion is exactly what one expects. The real question is whether it was wrong. Two deponents say on oath that it was, being the attorney who drafted the pleading, and Averda's managing director, who adds that the facility's actual use will be proved at trial. The Aon defendants offer no fact to the contrary. They rely on the original pleading alone. But an allegation does not become true because it was pleaded. Pleadings are not evidence. The amendment procedure exists to correct them most naturally at this early stage, before any plea has been filed, where no admission by an opponent is withdrawn and no issue has yet been joined.
- [38] The explanation, though terse, is real, and it is corroborated by the objective chronology. The particulars were drawn against a contractual time bar expiring in February 2025, which saw the demand on 6 February 2025, and summons

on 13 February 2025, in which case the bar would be expiring days later. The haste shows on the face of the pleading itself. Paragraph 23, quoted above, is ungrammatical as issued. The attorney says the reservoir phrase crept in by error in those circumstances. The answering affidavit meets this with a general denial and argument. A bare denial does not create a real dispute about a positive, plausible explanation. (See *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 13.) I accept that the reservoir descriptor does not reflect the case Averda intends to prove, and that its insertion was an error in that sense.

[39] The charge of bad faith goes further. It supposes that the original description must have come from Averda's instructions, and was pleaded "*because that is what it was*". There is no evidence of what the instructions were. The submission is conjecture. *Mala fides* is a serious finding. It is not made on speculation. What the record shows is an attorney drafting in days against a time bar, a descriptor now disavowed on oath by attorney and client alike, and a deletion sought at the first opportunity, once the exceptions had identified the difficulty. A plaintiff that amends to meet an exception does what the rules contemplate. That is the ordinary and proper response to an exception. It is not, without more, bad faith.

[40] The question is whether there is a triable issue. The threshold is modest, constituting *prima facie* something deserving of consideration, not proof of the issue (see *Trans-Drakensberg supra* at 640H-641A.) Whether the cells fall within the exclusion of "*reservoirs*" raises a double question. The first is factual, concerning what these cement cells are, how they were designed, and what function they served at a waste management facility. The second is one of interpretation, determining what "*reservoirs*" means in this policy. The exclusion does not catch every water-retaining structure it expressly excludes "*storage tanks*". Mr Keyrouz says on oath that the facility "*did not act as reservoirs*". The papers describe the damaged structures as cell 1, cell 2 and cell 3 of a waste facility. There is, in short, a live question of fact and a construction fit for trial. That constitutes a triable issue.

[41] The complaint that “cells” is a meaningless description takes the matter no further. The amended particulars identify the property by location. They describe the damaged structures, being cement cells, designed to stand in the open, exposed to the weather. They date the event, identify the peril, and quantify the loss as reinstatement costs, including the replacement of crusher rocks. A defendant can plead to that. If the Aon defendants genuinely cannot, the rules give them remedies, including an exception directed at vagueness, taken in the proper way.

[42] I find that the amendment is *bona fide*, that it has been explained, and that it supports a triable issue.

Does the pleading remain excipiable?

[43] The first ground of objection asserts that the second and third grounds of exception “*have not been addressed*”. As a factual premise, that is not accurate. The amendment engages both grounds. It adds the professional-standard duty and its breach. It recasts the wrongfulness allegation. It adds causation allegations to both legs of the claim. The real question is whether the additions are enough in law.

[44] On wrongfulness, Mr Govender SC invoked *Fourway Haulage*. The principles are not in doubt. The loss claimed from a broker, where the client’s insurance claim went unpaid, is pure economic loss. Negligent causation of pure economic loss is not *prima facie* wrongful. Wrongfulness depends on considerations of public and legal policy. A plaintiff must plead wrongfulness and the facts said to sustain it, failing which the particulars may be excipiable. (See *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at paras 12-14.)

[45] But the amended particulars do not rest on a bare conclusion. They plead the facts from which the legal duty is said to arise, that being:

[45.1] a broker-and-client relationship;

- [45.2] Aon's appointment as Averda's broker under the policy, for commission;
- [45.3] Mr Wiehman's administration of the claim,
- [45.4] the specific claim-handling functions that the Aon defendants bore to accept claims, being to report them to the insurers, to supply information, to prosecute the claim, and to report its outcome;
- [45.5] Averda's dependence on that performance; and
- [45.6] the professional standard against which the Aon defendants are to be measured.
- [46] Our courts have entertained delictual claims against brokers and other professional advisers for the negligent performance of professional services. Whether considerations of policy, including the relationship between the delictual claim and the pleaded mandate, will in the end sustain or defeat wrongfulness is a question for exception or trial, after full argument. It cannot be said that the delictual claim, as amended, is clearly excipiable. That is the end of the enquiry at this stage.
- [47] The mandate ground has two limbs. The first that the unwritten portion of the mandate is not identified as oral or tacit misreads the pleading. Paragraph 45 of the particulars pleads when, where and by whom the mandate was concluded, and annexes its written portion, an email exchange. Paragraph 46 pleads the remaining terms as tacit, alternatively implied. Tacit and implied terms are unspoken by definition. They are not "*oral*" terms. Rule 18(6) requires no more than the pleading already provides. The second limb the absence of *facta probanda* for causation is met by the proposed paragraphs 44 and 51, where it is set out that had the Aon defendants performed their duties, the insured event would have been indemnified by the insurer defendants. That is a complete causation allegation. Whether Averda can prove it, including

whether the reservoir exclusion would in any event have defeated indemnity, is the very triable issue identified above.

- [48] The alternative submission in the heads that the amended pleading would be vague and embarrassing fails for the reasons already given on the adequacy of the description.

Prejudice

- [49] Prejudice is the test. The only prejudice the Aon defendants identified is “*having to deal with an excipiable pleading*”. That falls away with my conclusions above. The pleading is not clearly excipiable. No other prejudice was suggested, and none appears from the papers. No plea has been delivered. No trial date exists. No admission of the Aon defendants is disturbed. No evidence has been lost.
- [50] Refusal, by contrast, would prejudice Averda severely. Its pleading would not reflect the case it says is true. A claim of R 8 566 668 would then stand to be decided on a drafting slip rather than on the evidence.
- [51] The amendment must accordingly be granted.

Costs

- [52] That leaves costs, and the scale. Mr Posthumus asked that the costs be costs in the cause. Mr Govender SC asked that Averda pay the costs in any event. He relied on *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C. The normal rule is that an applicant for an indulgence pays the costs reasonably wasted by the application, including the costs of opposition that is reasonable and not vexatious or frivolous. Rule 28(9) reflects the same idea. A party giving notice of amendment is, unless the court directs otherwise, liable for the costs thereby occasioned to any other party.
- [53] That rule applies here. Averda seeks an indulgence occasioned by its own drafting error. When the Aon defendants had to decide whether to object, the notice of amendment stood before them unexplained. The explanation came only later, in the founding affidavit. The wrongfulness point was a serious one,

seriously argued. The opposition failed, but it was neither frivolous nor vexatious nor unreasonable. I add only that the persistence in the charge of bad faith, after the explanations were on oath, was the weakest part of the opposition. It does not, on its own, make the opposition unreasonable.

[54] Averda must therefore pay the costs of the application, including the costs of the opposition. As to scale, rule 67A, read with rule 69(7), requires the court to fix the scale of counsel's fees. The application raised discrete questions of law, of moderate complexity, in a claim of significant value. Scale B is appropriate.

Order

[55] I make the following order:

1. The applicant, Averda South Africa (Pty) Ltd, is granted leave to amend its particulars of claim in accordance with its notice of intention to amend dated 25 April 2025, save that the references to the "*first to fourth plaintiffs*" in the proposed paragraphs 44 and 51 shall read "*first to fourth defendants*".
2. The applicant shall deliver the amended pages of its particulars of claim within 15 days of the date of this order.
3. The applicant shall pay the costs of the application for leave to amend of the first and second respondents, Aon South Africa (Pty) Ltd and Mr Dirk Wiehman, including the costs of their opposition, with counsel's fees on scale B.

GARVEY AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Heard:
Judgment delivered:

11 June 2026
9 September 2026

Appearances:

For the applicant:
Instructed by:

Adv I L Posthumus
Van Zyl Ebrahim Cook Attorneys
Incorporated, Johannesburg

For the first and second respondents:
Instructed by:

Adv A Govender SC
Cliffe Dekker Hofmeyr, Sandton