



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 2174/2021

In the matter between:

EDWIN OKEY CHIKATA IJEOMA

First Applicant

**CENTRE FOR SCIENTIFIC RESEARCH
AND INNOVATION (PTY) LTD**

Second Applicant

and

UNIVERSITY OF FORT HARE

Respondent

In re:

UNIVERSITY OF FORT HARE

Plaintiff

and

EDWIN OKEY CHIKATA IJEOMA

First Defendant

CENTRE FOR SCIENTIFIC RESEARCH AND

Second Defendant

INNOVATION (PTY) LTD

JUDGMENT

Govindjee J

[1] The defendants seek leave to amend their plea ('the proposed amendment'). Following a previous attempt to do so, this court (per Rugunanan J) issued an order on 30 August 2022 ('the first judgment') granting leave to amend to a limited extent. The first judgment includes a useful summary of the background to the matter, which need not be repeated.¹ In essence, the plaintiff issued summons against the defendants for payment of approximately R4,7 million, alleging that the first defendant failed to disclose his interest in and his exclusive control of the second defendant ('the CSRI'), which entered various contracts for the supply of services to the plaintiff. The claim is that the first defendant committed misconduct and breached his employment contract in doing so. The first alternative basis for the claim is a disgorgement of profits for the sum claimed and earned at the expense of the plaintiff during the first defendant's period of employment. The second alternative basis for the claim is the CSRI's alleged failure to render its corresponding performance under contracts with the plaintiff, so that the plaintiff seeks restitution of its own performance and recovery of the amount claimed.

[2] As was previously the case, the defendants seek to introduce a special plea of prescription. The defendants further seek to introduce additional special pleas and to amend certain paragraphs of their pleaded defence. The plaintiff opposes the application, also on the basis that it is not borne in good faith.²

¹ Unreported case no. 2174/2021 (Eastern Cape Division, Makhanda).

² The plaintiff argues that the defendants' explanation for failing to amend their plea subsequent to the first judgment is unconvincing, and that their failure to do so is significant in determining whether a further indulgence should be permitted. They highlight the following subsequent events: the defendants delivered an amended plea on 22 February 2023 in contravention of the rules, and without raising a special plea of prescription. That amendment was withdrawn on 23 March 2023, without any tender of costs, following the plaintiff's notice in terms of Rule 30(2)(b). This was accompanied by a (second) notice to amend, which was withdrawn on 5 April 2023 after delivery of the plaintiff's notice of objection on 30 March 2023. Again, the defendants failed to tender the plaintiff's costs. That notice had been couched in similar terms to the present (third) notice to amend.

[3] Various principles inform a court's discretion whether to grant or refuse an amendment. These have been summarised comprehensively in the first judgment, and include the following:³

- i. The court has a discretion whether to grant or refuse an amendment.⁴
- ii. The court will allow an amendment, even though drastic, if it raises a new question that the other party should be prepared to meet.
- iii. With its large powers of allowing amendments, the court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.
- iv. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a bona fide mistake.
- v. Bona fide amendments that facilitate a fair trial should typically be allowed, unless the amendments cause an injustice that cannot be remedied by way of a costs order, 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'.⁵
- vi. An amendment requires some explanation, including a reasonably satisfactory account for any delay, and should not be refused simply to punish the applicant for neglect.⁶
- vii. The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue'.⁷
- viii. The modern tendency is in favour of an amendment if this will facilitate the proper ventilation of the dispute between the parties.⁸

³ *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876A – D; *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) ('Waymark NO') at 77F – I; *Media 24 (Pty) Ltd v Nhleko & Another* [2023] ZASCA 77 ('Media 24') paras 16 – 19.

⁴ *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 at 243.

⁵ *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29 as confirmed in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 9, 10.

⁶ See *GMF Kontrakteurs (Edms) Bpk and Another v Pretoria City Council* 1978 (2) SA 219 (T) at 222E – F; *Waymark NO* at 77F – I.

⁷ *Ibid.*

⁸ *Ibid.*

[4] It is worth emphasising that these principles, and the relevant rules of procedure,⁹ must be interpreted and applied in a manner that gives effect to the constitutional right to have disputes that can be resolved by the application of law decided in a fair public hearing, and in the interests of justice.¹⁰ The primary principle is that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.¹¹ As Caney J held in *Trans-Drakensburg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another*:¹²

‘... the aim should be to do justice between the parties by deciding the real issues between them. The mistake or neglect of one of them in the process of placing the issues on record is not to stand in the way of this; his punishment is in his being mulcted in the wasted costs. The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation ... that the applicant for the amendment is required to show it is *bona fide* and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated. He does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect. 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 ... or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares ... or of obtaining a tactical advantage ...’ (references omitted).

⁹ In terms of Uniform Rule 28(10), the court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

¹⁰ S 34 of the Constitution of the Republic of South Africa, 1996. See *SASOL South Africa t/a SASOL Chemicals v Gavin J Penkin* [2023] ZAGPJHC 329; Also see *TN obo BN v Member of the Executive Council for Health, Eastern Cape* [2021] 1 All SA 561 (ECB) para 34.

¹¹ See *Trans-Drakensburg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 637H – 638B, and the authorities cited thereafter.

¹² Ibid at 640H – 641B.

[5] Recent authority confirms that it is for the plaintiff to show that the amendments have been requested *mala fide*.¹³ The plaintiff did not base its objection on prejudice that would be suffered by it that cannot be cured by an appropriate costs order. Instead, specific objections were raised to certain paragraphs of the amended plea that accompanied the defendants' notice of intention to amend. It is convenient to consider the various special pleas and amendments that have been objected to before considering the overarching complaints of bad faith and delay.

The special pleas of prescription

[6] The particulars of claim allege various forms of misconduct on the part of the first defendant which resulted in losses to the plaintiff in the amount of R4,7 million. The case is that the first defendant's misconduct comprised a series of material breaches of his contract of employment. In the alternative, an alleged violation of the duty of good faith resulted in the obligation to disgorge secret profits received to the tune of R4,7 million. In the further alternative, the plaintiff claims entitlement to restitution of its performance (in the same amount) based on the CSRI's failure to perform in terms of its contractual obligations.

[7] The plaintiff pleads that it only became aware of the first defendant's interest in the CSRI during December 2020, the first defendant having not disclosed this during the period of his employment. The proposed amendment introduces various facts suggestive of the plaintiff's deemed knowledge of the facts from which the debt arose, and identity of the first defendant as debtor, 'between May 2012 and May 2015 *alternatively* 2016'.¹⁴ This is based on the allegation that three senior employees of

¹³ See *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41 para 90.

¹⁴ S 12 of the Prescription Act, 1969 (Act 68 of 1969) deals with 'when prescription begins to run', as follows:

- (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
- (4) ...

the plaintiff, exercising reasonable care, would have 'conducted an enquiry or investigation into the factual and legal basis for payments made ... each time they were paid by the plaintiff or a year thereafter'. Such an investigation would have illuminated the facts from which the debt arose and identity of the defendants more than three years before the institution of the claim, so that it had prescribed when issued.

[8] The plaintiff's first argument, that the amended plea fails to address the issues identified in the first judgment regarding the special plea of prescription, is without merit. There the court considered the inference that 'the plaintiff knew of the breaches of conduct upon which it bases its claims as such conduct occurred in 2015' and decided that 'the defendants ought to have pleaded facts to support the inference, or pleaded facts which indicate that the plaintiff knew of the said conduct at any time during the specified period', so that the special plea was excipiable. The relevant portion of the amended plea is based squarely on the s 12(3) proviso and sufficient facts have been pleaded in support to raise, *prima facie*, a triable issue. While specific dates upon which the plaintiff allegedly obtained constructive knowledge may not have been identified, this is not fatal to the proposed amendment.¹⁵

[9] The next argument, that the remaining special pleas of prescription fail to make a true distinction in respect of the alternative claims, is unfounded considering the similar underpinning facts for these causes of action, as evinced by the cross-reference in the particulars of claim to facts contained in the primary cause of action. To illustrate the point, the claim against the CSRI is connected to failure to render performance 'in terms of each of the contracts with the plaintiff set out in paragraph 20'. Those contracts are dated between May 2012 and May 2015, the plaintiff claiming entitlement to restitution. The special plea of prescription, properly read, encapsulates the various causes of action and adequately distinguishes between the debts allegedly owed by the first defendant and the CSRI.

¹⁵ For a special plea worded with even less detail, see the judgment of Goldstein J in *Ditedu v Tayob* 2006 (2) SA 176 (W) para 2. Also see *Gunase v Anirudh* 2012 (2) SA 398 (SCA). It is well established that the defendants bear the onus of proving when the plaintiff acquired, or should reasonably be deemed to have acquired, the knowledge in question, and that the s 12(3) exception to the general rule is separate from the s 12(2) exception: *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) paras 32 and following.

[10] The third argument is that the defendants have failed to plead any facts supportive of the conclusion that any of the three employees mentioned ‘bore the responsibility or had the capacity and skills to conduct such enquiries or investigations, by reason of their respective job descriptions’. As *Mr Mabuza* argued, that argument fails to draw a distinction between *facta probanda* and *facta probantia*.¹⁶ The pleading contains sufficient particularity of the material facts relied upon to substantiate the point in question, and to enable the plaintiff to reply.¹⁷

[11] The remaining grounds of objection to the special plea of prescription may be rejected on the basis that they ignore the statutory distinction between actual knowledge, and the first judgment’s determination in that respect, and deemed knowledge.¹⁸ While it has been said that special pleas of prescription are rarely pleaded elegantly,¹⁹ the defendants in this instance clearly set their stall with reference to the s 12(3) proviso. It is open to the plaintiff to replicate, also with reference to s 12(2) if appropriate. It is furthermore not unusual for defendants raising prescription to plead an outer limit, ‘and then for the evidence to reveal some sort of give or take in this respect’.²⁰

The second special plea: failure to disclose a cause of action

[12] The defendants seek to amend the plea by introducing the defence that the plaintiff’s particulars of claim do not disclose a cause of action in respect of its claim for contractual damages. The basis for this is that the damages allegedly suffered by the plaintiff ‘do not flow naturally and generally from the alleged breaches’ and are thus too remote.

¹⁶ See *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23 and *JSS Industrial Coatings CC v Inyatsi Construction (South Africa) (Pty) Ltd* [2017] JOL 37193 (GSJ).

¹⁷ See *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 798.

¹⁸ See *Leketi v Tladi NO and Others* [2010] ZASCA 38; [2010] 3 All SA 519 (SCA) paras 10, 11 and 18.

¹⁹ *Diko v MEC for Health* [2022] ZAECBHC 11 (*‘Diko’*) para 68.

²⁰ *Ibid* para 70.

[13] The objection to the proposed amendment is that no explanation is provided for the assertion that the nature of the breaches precludes the presumption of law that the damages fell within the contemplation of the parties and are therefore not regarded as being too remote.

[14] The criticism that there is insufficient detail in the proposed amendment to raise a peremptory special plea is unfounded. The second special plea, *prima facie*, raises a triable issue in the form of a defence to the claim for damages and should be allowed.²¹ The suggestions that the point should have been raised by way of exception, or amounts to an irregular step, appear to be without merit. From the authorities provided, and the limited argument presented on the point, the accepted position appears to be that it is of no concern to the other party if the defence is raised by way of exception or as a special plea.²² There has additionally been no demonstrated prejudice, so that the proposed amendment must be granted.

Third special plea: failure to disclose a cause of action for alternative claim for disgorgement of profits

[15] The crux of this special plea is that a claim for disgorgement requires an allegation that the first defendant appropriated the plaintiff's corporate opportunity to make the alleged secret profits. The plaintiff objects to the proposed amendment on the basis that no such allegation is necessary, so that the third special plea is excipiable and should be disallowed.

[16] The requirements of a claim for disgorgement of profits have been summarised as follows in *Sime Darby Hudson and Knight (Pty) Ltd v Lerena*:²³

'In order to succeed in its claim for a disgorgement of profits the plaintiff must establish that the defendant owed it a fiduciary obligation; that in breach of that obligation the defendant placed himself in a position where his duty and his personal interest were in conflict and, finally

²¹ *Shatz Investments (Pty) Ltd v Kalovyrynas* 1976 (2) SA 545 (A) at 550B – E.

²² See LTC Harms *Amler's Precedents of Pleadings* (9th Ed) (2018) part A IV p 6; *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) para 18; *AS v Neotel (Pty) Ltd* 2019 (1) SA 622 (GJ) fn 2; *Medihelp v Minister of Finance NO* [2020] ZASCA 29 para 12.

²³ *Sime Darby Hudson and Knight (Pty) Ltd v Lerena* [2018] 4 All SA 446 (WCC) para 95.

that the defendant made a secret profit out of corporate opportunities belonging to the plaintiff. I deal with these requirements in turn ...'

[17] The object of pleading is to define the issues. Within certain limits, it is accepted that the court is afforded a wide discretion on the basis that the pleadings are made for the court, not vice versa.²⁴

'And where a party has had every facility to place all the facts before the trial court ... there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.'

[18] In my view it would be over-technical to uphold the defendants' arguments in this respect. The plaintiff has defined its alternative cause of action sufficiently clearly to enable the defendants to appreciate the case they should be prepared to meet in respect of allegations of secret profits and disgorgement.²⁵ This includes the averment that secret profits were made 'at the expense of the plaintiff'. This is not an instance of the defendants possibly being misled by the wording of the alternative claim.²⁶ The pleadings, properly interpreted, explain the alternative basis of the plaintiff's claim.²⁷ The plaintiff has set out, in concise terms but with sufficient particularity, the material facts it intends to rely upon in the alternative. While pleadings must be drawn carefully, the rules do not require drafting perfection and courts have been enjoined not to read them pedantically.²⁸ In this instance, and as argued by *Ms Gordon-Turner*, the plaintiff's allegations are clearly cognisable and the amendment is disallowed.

Fourth special plea: The alternative claim for restitution

[19] The question raised by this amendment is whether the particulars of claim disclose a cause of action in respect of the restitution claim. The defendants aver that the plaintiff has not alleged cancellation of a contract and tendered any performance

²⁴ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173.

²⁵ See *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 202.

²⁶ See *Stead v Conradie en Andere* 1995 (2) SA 111 (A) at 122.

²⁷ See *Gcaba v Minister for Safety and Security* [2009] ZACC 26 para 75.

²⁸ H Daniels *Beck's Theory and Principles of Pleadings in Civil Actions* (6th Ed) (2002) at 46.

it has received, alternatively has failed to plead a legally competent cause of action to support the claim.

[20] The defendants rely upon *Drummond Cable Concepts v Advancenet (Pty) Ltd*,²⁹ a case dealing with an exception, in support of the amendment. That judgment draws a clear distinction between claims for contractual damages and claims for restitution, adding the following in respect of pleadings:

‘For a claim of restitution (or rescission as it is sometimes referred to) to succeed the plaintiff must in her pleadings tender return of whatever she has received from the bargain. If she received no benefit at all as had occurred in *Probert*, she must plead this fact ... None of this is in the pleadings of the plaintiff in this case. Absent averments to this effect, the cause of action relied upon cannot be sustained ...’

[21] The plaintiff has failed to deal with this authority, suggesting only that ‘the claim for restitution is one for unjustified enrichment’, so that it is unnecessary to allege and prove cancellation of the contracts and to tender return of any performance received. That suggestion is not borne out by the contents of the particulars, which fails to follow the recommended approach of formulating the claim in terms of either a general enrichment action or one or other of the various *condictiones*.³⁰

[22] The only other objection repeats the plaintiff’s issue that an exception is being raised by way of special plea. In these circumstances, and in the absence of authority to the contrary, the amendment should be allowed.

Paragraphs 39 and 41

[23] The defendants seek to amend the plea as follows:

‘Ad paragraph 6:

39. The defendants admit that the first defendant was additionally appointed by the plaintiff to several other projects, including the IDAM project P722, P290 and

²⁹ *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) para 24.

³⁰ LTC Harms *Amler’s Precedents of pleadings* (9th Ed) (2018) (LexisNexis) at 187.

P595. The defendants deny that these appointments for externally funded projects were subject to the plaintiff's Supply Chain Management Policy and Procedure as each of those projects has its own agreed terms and conditions between the parties involved.

Ad paragraphs 7, 8, 9, 10 and 11

40. ...

41. The defendants deny that annexure "UFH3" is applicable to the Externally Funded Projects.'

[24] The amendments in question seek to raise a defence based on a distinction with 'externally funded projects'. The first judgment considered and allowed this, even though this involved the withdrawal of an admission.³¹ I have no difficulty in following that judgment on the point, also on the basis that the amendments, prima facie, raise a triable issue and in the absence of any demonstrable prejudice to the plaintiff. The amendments are allowed.

Paragraphs 42, 43 and 75

[25] The objection to paragraph 75 was based on a typographical error contained in the notice of amendment. The intention was to admit the contents of sub-paragraph 23.1, which relate to the first defendant's duty of good faith, and deny the remainder of the allegations in paragraph 23. Leave to amend the typographical error is not opposed and is granted.

[26] What remains are the following objections:

'7.6 At paragraph 23.3 of the particulars of claim ... the plaintiff alleges that the first defendant is obliged to disgorge the secret profits of no less than R4 773 199.05 in favour of the plaintiff.

³¹ The first judgment: paras 20, 27. An attachment to the replying affidavit demonstrates that the plaintiff had raised the same objections before Rugunanan J.

7.7 In paragraph 75 of the proposed amended plea, the defendants baldly deny this allegation. The defendants' denial is inconsistent with and contradicts the admissions made in paragraphs 42, 43 and 75 of the proposed amended plea, referred to in paragraphs 7.1, 7.2 and 7.5 above, and as such the denial is embarrassing, and absent any cogent explanation, tends to show bad faith, is without merit, and does not make out a defence.'

[27] The defendants admit that the first defendant owed the plaintiff a duty of good faith, by virtue of his employment, which entailed that the first defendant was:

- a) obliged not to work against the plaintiff's interests;
- b) obliged not to place himself in a position where his interests conflicted with that of the plaintiff;
- c) obliged not to make a secret profit at the expense of the plaintiff; and
- d) obliged not to receive any bribe, secret profit or commission in the course of or by means of his position as employee of the plaintiff.

[28] The defendants deny that, in breach of the admitted duty of good faith, and by way of misconduct, the first defendant:

- a) worked against the plaintiff's interests;
- b) placed himself in a position where his interests conflicted with that of the plaintiff;
- c) made secret profits at the expense of the plaintiff; and
- d) received the secret profits by virtue of his employment, so that the first defendant is obliged to disgorge the secret profits.

[29] The distinction between admitting a duty of good faith, on the one hand, and misconduct culminating in an obligation to disgorge secret profits, on the other, is immediately apparent. The defendants' denial of an obligation to disgorge secret profits must be construed together with the defences raised by the plea, including the introduction of special pleas which, if successful, will result in the avoidance of liability. In these circumstances, a prima facie triable issue is raised and the amendment is allowed.

Paragraphs 47 to 50

[30] The proposed amendments seek to deny the assertion that the first defendant failed to disclose to the plaintiff his interest in and exclusive control of the CSRI. It is a sequel to the defendants' previous assertion that the plaintiff had known of the first defendant's interest and role in the CSRI since 2011. The first judgment refused an attempt to introduce this allegation on the basis of non-specificity. The proposed amendments are based on an alleged oral understanding between the first defendant and two senior university figures, during 2010, that CSRI would be established by the first defendant as a vehicle for externally funded projects. The plaintiff would remunerate the CSRI for services rendered, and the first defendant and / or other employees of the plaintiff 'and other third parties' would be remunerated by CSRI. The amendment continues as follows:

- '49. The above was known at all material times (2010 – 2016) by the plaintiff's then Vice Chancellor, Prof Mvuyo Tom, Chief Financial Officer Mr Robin Stone, project finance manager Mr Adrian Runganathan and other employees from the project finance office. Accordingly, through these employees the plaintiff acquired knowledge that the first defendant would pre-incorporation of the second defendant be a director of the latter and was a director of second respondent post incorporation.
- 50. The defendants deny the allegations contained in this paragraph. The first defendant disclosed that he would have an interest in the second defendant when he agreed to form the second defendant as per the above. Alternatively, the duty to disclose did not arise as the plaintiff ... and other employees from the project finance office had knowledge ... of the first defendant's interest (potential and actual) in the second defendant).'

[31] Two grounds of objection are raised. Firstly:

'8.3.9 However, the defendants have failed to plead in terms that post incorporation of the second defendant, the first defendant advise any one or more of the persons listed ... that he was and is a director of the second defendant, and if so, on what date, where and in what form he did so (written or oral).

8.3.10 In short, the defendants have failed to allege any facts to show that the first defendant discharged the positive duty upon him ...'

[32] The objection is directed to a failure to allege a disclosure of interest after incorporation of CSRI. There is no objection, seemingly, to the amendment alleging that pre-incorporation disclosure occurred. The objection appears to overlook the averments as to the 2010 oral arrangements involving senior personnel and the allegation that the Vice Chancellor, chief financial officer, project finance manager and other employees from the project finance office knew of these arrangements so that '...the plaintiff acquired knowledge that the first defendant would pre-incorporation of the second defendant be a director of the latter *and was a director of second respondent post incorporation*'.

[33] I agree with *Mr Mabuza* that upholding the objection would place form over substance and that, even if the time of disclosure is at issue, a triable issue has been raised. Absent any prejudice to the plaintiff, the objection fails.

[34] The second objection claims inconsistency between paragraph 46 of the proposed amended plea, on the one hand, and paragraphs 47 to 50, on the other, so that the amendment occasions embarrassment. In paragraph 46, the defendants aver that they have no knowledge of the plaintiff's allegation that it only became aware of the first defendant's interest in CSRI on or about 1 December 2020. That allegation is accordingly not admitted. There is no inconsistency between that position and the defendants amended plea that the plaintiff, through its employees, had knowledge of the interest much sooner (2010 to 2016). The objection is without merit and the proposed amendments are allowed.

Paragraph 51

[35] The plaintiff details the first defendant's alleged misconduct in paragraph 19.2 of the particulars of claim, on the basis that the first defendant caused the CSRI to contract with the plaintiff, inter alia, by falsifying quotations from fictional entities and abusing his position of authority. The defendants seek to amend their plea to this as follows:

‘Save to admit that the plaintiff contracted with the second defendant on several occasions to perform work for it relating to externally funded projects that had been secured on behalf of the plaintiff. The rest of the allegations in these paragraphs are denied.’

[36] The crux of the objection is that, in effect, the first admits participation in contracts awarded by the plaintiff to CSRI, and thereby breach of a material term of the contract of employment. That argument is premised on an erroneous reading of the proposed amended plea, which does not amount to an admission that the first defendant participated in contracts awarded by the plaintiff to the CSRI.

[37] An added basis for objection is that the defendants fail to allege any facts demonstrating that the first defendant discharged the positive duty to disclose his interest in any contract to be awarded by the plaintiff to the CSRI. The difficulty with this objection is that the related paragraphs of the particulars of claim do not address the first defendant’s positive duty to disclose. That was dealt with in paragraph 19.1 of the particulars of claim and has been pleaded to separately. It is unclear why the defendants should nonetheless have added reference to this in pleading to paragraph 19.2. The amendment is accordingly allowed.

Paragraph 52

[38] The proposed amendment denies that the first defendant received payment on behalf of CSRI of invoices paid by the plaintiff to its business banking account, to which the first defendant is the registered authorised representative. The plaintiff objects on the basis that this amounts to a bald denial that contradicts a subsequent admission that CSRI received approximately R4,7 million as payment for invoices for the 2013, 2014 and 2015 financial years, and that the proposed plea avoids the point of substance and contravenes Uniform Rule 18(5).

[39] I disagree. The defendants have unequivocally denied both allegations pleaded by the plaintiff and put the plaintiff to proof thereof. There is no suggestion of prejudice and any further clarification required may be sought by way of a request for further particulars. I am also of the view that the denial does not contradict the subsequent

admission, which relates to receipt of an amount of money by CSRI for services rendered by the first defendant and other third parties including the plaintiff's employees. The proposed amendment is therefore allowed.

Paragraph 58

[40] The defendants admit that all university policies, including the plaintiff's Supply Chain Management Policy and Procedure, are binding upon all employees of the plaintiff. The proposed amendment seeks to rely on a condition precedent contained in the Supply Chain Management Policy and Procedure, arguing that the University Council's non-fulfilment of the condition resulted in the suspension of the operation of the policy. Considering the available authorities, there is no inconsistency warranting rejection of the proposed amendment.³² While the earlier admission appears to create a direct contradiction, the proposed defence is clear when the plea is read in its entirety. It would be unnecessarily formalistic, in my view, to require amendment to the earlier admission in order to align its contents more accurately with the plea in this paragraph. A proper ventilation of the dispute requires the exercise of a discretion to allow the amendment in the circumstances.

Paragraphs 60, 61 and 70

[41] The issue at hand relates to the defendants' denial of a conflict of interest, and plea to the effect that there was therefore no need to recognise or disclose any conflict of interest. The objection is based on the submission that a conflict of interest is self-evident, and inherent, given the defendants' version that the first defendant represented both the plaintiff and CSRI when contracting for services in relation to externally funded projects.

[42] The objection amounts to legal argument. The proposed amendments are capable of replication and whether any conflict of interest existed or was inherent and

³² See the judgment of Wallis AJA in *Mia v Verimark Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA) para 1: the conclusion of a contract subject to a suspensive condition creates "a very real and definite contractual relationship" between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended.

required recognition or disclosure is prima facie a triable issue. Absent any discernible prejudice, the amendments are allowed.

Paragraphs 62 to 64

[43] The particulars of claim allege that the first defendant was a role player in the plaintiff's supply chain and that he failed to disclose his interest in the contracts to be awarded to the CSRI and failed to withdraw from participation in the process relating to those contracts.

[44] The proposed amendments deny these allegations on the basis that the first defendant's interest in the CSRI was known to the plaintiff prior to it contracting with the CSRI. The defendants plead that the first defendant did not have to withdraw from supply chain management process participation in relation to those contracts 'because the first defendant was never part of those processes'.

[45] The crux of the plaintiff's objection relates to allegedly contradictory pleas to other paragraphs of the particulars of claim. The plaintiff does not explain the suggested contradictions with reference to provisions of the applicable policy. In any event, upholding that objection may require interpretation of the word 'processes' as it is used in the applicable policy. It is inappropriate to do so at this stage.³³ It suffices to note that the proposed amendment does not cause embarrassment and that the plaintiff may plead to the impugned paragraphs so that the issues related to whether the first defendant was a role player in the plaintiff's supply chain, and ought to have withdrawn from processes relating to CSRI contracts, are prima facie triable. The amendments are allowed.

Paragraphs 65 to 67

[46] The plaintiff alleges that the first defendant conducted himself in a manner expressly prohibited by clauses of the Supply Chain Management Policy and Procedures. According to the plaintiff, he did so by failing to protect its interests in

³³ See *Media 24* above n 3 para 15.

various ways, also by failing to procure performance by the CSRI of its contractual obligations and by not ensuring that the plaintiff received value for the payments it made to CSRI. It is also alleged that the first defendant sought and accepted financial gain in interacting with the CSRI on behalf of the plaintiff and that he simultaneously acted on behalf of the CSRI in those interactions, disregarding a patent conflict of interest.

[47] The proposed amendments deny these allegations. This is on the basis that all the CSRI's contractual obligations to the plaintiff were fulfilled so that the plaintiff received value for the payments it made to the CSRI. The defendants also aver that the first defendant could not have acted in breach of clauses of the Supply Chain Management Policy and Procedures given that it was the CSRI that conducted business on behalf of the plaintiff and received a benefit or gain from the plaintiff.

[48] The objection is that the last-mentioned averment is irreconcilable with the admissions that the first defendant had an interest in the CSRI and was in control, either jointly or solely thereof, and would be remunerated by the CSRI after it received remuneration from the plaintiff for services rendered.

[49] Determining the real issue at hand requires interpretation of clauses of the plaintiff's Supply Chain Management Policy and Procedures.³⁴ That the CSRI was a separate juristic person will also require consideration. As was the case with the previous objection, it would be premature to interpret the relevant clauses at this juncture and the amendment is allowed.

³⁴ Clause 49 addresses 'compliance with ethical standards & conflict of interest, as follows:

'49.1 In line with the code of conduct of the University of Fort Hare, all staff members of the University are expected to adhere to the following:

- (a) Every employee has a fiduciary relationship with the University and as such is obliged to protect the interests and wellbeing of the University. Therefore the employee will neither seek nor accept financial gain in any interaction on behalf of the University. Conflict of interest may arise as a result of activities in which employees engage as private individuals. Employees must refrain from allowing their dealings on behalf of the University to be influenced by personal or family interests, or the interests of friends or associates. Competition with the University is prohibited.
- (b) Employees may not accept any form of benefit or payment through the transaction of business on behalf of the University;

Delay and bad faith

[50] The plaintiff's objections to the proposed amendments based on undue delay and bad faith must be construed by considering the accepted principles governing pleadings. In respect of tardiness, delay in bringing forth an amendment is generally, in the absence of prejudice, not a sound basis for refusing an amendment. Leave to amend may be granted 'at any stage', even where mistakes and omissions have been careless, and the application is particularly late.

[51] The amendments that have been allowed will facilitate a proper ventilation of the dispute between the parties and a fair trial. The delays detailed in the papers, when considered together with the explanations offered for this and the chronology of events, are not of the kind that cause irremediable prejudice to the plaintiff and which should, without more, warrant refusal. A reasonably satisfactory account for the delay has been proffered. Linked to this, and as is apparent when considering the reasons for allowing many of the proposed amendments, it cannot be said that the application amounts to a delaying tactic or has been brought in bad faith.

[52] In instances where there are no objections to paragraphs of the amended plea, the amendments are also allowed.

Costs

[53] I have considered the issue of costs in the light of counsels' submissions. These are usually borne by an applicant seeking leave to amend, on the basis that an indulgence is being sought. In my view, the opposition to the intended amendments was not unreasonable. It certainly cannot be said that none of the bases upon which the application was opposed had a realistic prospect of succeeding, and in one respect the ground of objection has been held to be valid.³⁵ In many of the instances where an amendment has been permitted, this was only following scrutiny and detailed consideration of the wording of the proposed amendments, the grounds of objection

³⁵ See *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust* [2020] ZASCA 22 para 31.

and the applicable principles. I am satisfied that there is therefore no reason to depart from the usual position.

Order

[54] The following order is made:

1. The defendants are granted leave to amend their plea to the extent set out in this judgment within ten days.
2. The defendants are jointly and severally liable to pay the costs of the application.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 01 June 2023

Delivered: 17 August 2023

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