REPUBLIC OF SOUTH AFRICA

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

Case Number: 050904-2022

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

18 September 2024 [redacted]
DATE SIGNATURE

In the matter between

ER MBO (PTY) LTD Applicant

and

ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD

Respondent

JUDGMENT

WANLESS J

Introduction

[1] On the 25th of November 2022, ER MBO (PTY) LTD *("the Plaintiff")* instituted an action in this Court

("the Plaintiff") instituted an action in this Court against ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD. *("the Defendant")*. This is an interlocutory application by the Plaintiff *(as Applicant)* in terms of subrule 28(4) of the Uniform Rules of Court *("the Rules)* to affect an amendment to the Plaintiff's Particulars of Claim *("the POC")*. The application is opposed by the Defendant *(as Respondent)*.

[2] Pursuant to the service of the POC (as set out above) the Defendant informally delivered a written Notice of Exception, which was preceded by the Defendant's Counsel collegially informing the Plaintiff's Counsel that the Defendant intended to except to the POC on the basis that no cause of action was disclosed. The thrust of the exception was that Cynamique (Pty) Ltd *("Cynamique")* could not have acted as an agent for and on behalf of a principal that did not yet exist.

[3] On 22 February 2023 the Plaintiff responded by delivering a Notice of Intention to Amend the POC in terms of Uniform Rule 28(1). In terms of the Notice to Amend the Plaintiff intends to amend its POC by stating that Cynamique acted as principal and not as agent *(as previously pleaded in the POC)* in the conclusion of the

sale agreement referred to in the POC *("the agreement")*. The Defendant delivered a Notice of Objection thereto on 7 March 2023 which gave rise to this application.

[4] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be *"converted"*, or more correctly *"transformed"*, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment, nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

The respective cases for the parties

[5] When the application was argued before this Court, Counsel for the Plaintiff presented a very

straightforward and simple address. In essence, it was submitted, on behalf of the Plaintiff, that the proposed amendment does no more than to correct an error in preparation of the POC and brings to the fore that it was always the intention of Cynamique, when contracting with the Defendant, that it would act as principal in favour of a company to be formed and would subsequently became the Plaintiff as evidenced by the *stipulatio alteri* pleaded as part of the agreement entered into with the Defendant.

[6] It was further submitted that, more importantly, the proposed amendment is aimed at ensuring a proper ventilation of the disputed issues between the parties and to determine the real issues between them so that justice may be done in the course of the action proceedings.

[7] When dealing with the objections raised by the Defendant *(which, it is common cause, are twofold)* the Plaintiff notes that, in the first instance, the Defendant contends that the proposed amendment advanced by the Plaintiff is made in bad faith, as it is purportedly intended purely to overcome the excipiability of the POC and does not reflect Cynamique's true capacity

when the agreement between the parties was concluded. The Defendant adopts this line on the basis that the substitution of the capacity of Cynamique from *"agent"* to *"principal"* is *mala fide* and brought purely to overcome the objection.

[8] Secondly, the Defendant suggests that by the time the Plaintiff was incorporated and accepted the terms of the agreement by way of the *stipulatio alteri* the agreement was cancelled on the Plaintiff's own version.

[9] In addition to the aforegoing, it should be noted that the Defendant has filed a notice to strike out various paragraphs in the Plaintiff's Replying Affidavit. Since the Defendant has simply filed a notice in this regard *(with no Founding Affidavit)* the Plaintiff has not formally responded thereto.

The law

[10] The correct principles of law to be applied in this matter are largely *(if not solely)* common cause between the parties. Those principles are set out hereunder.

[11] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties and to determine the real issues between them, so that justice may be done.[1]

[12] A Court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially.[2] These principles were summarised by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*, as follows:[3]

> *"[9]... [A]mendments 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."*

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[1] Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd [2004] 1 All SA 129 (SCA) at 133h-i; Four Tower Investments (Pty) Ltd v André's Motors 2005 (3) (SA) 39 (NPD) at 43G-H.

[2] Robinson v Rand Estates Gold Mining Company Ltd 1921 AD 168 243; Caxton Ltd v Reeva Foreman (Pty) Ltd 1990 (3) SA 547 (A) 565G

[3] 2006 (3) SA 247 (CC) at paragraph [9]

[13] When faced with an application for an amendment the paramount consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.[4]

[14] When faced with an application for leave to amend the Court will always be inclined to allow the amendment, even though it represents a drastic one or if it raises no new question that the other party should not be prepared to meet and importantly, a Court will allow an amendment, regardless of:

> "*...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*

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[4] See the remarks of Schreiner J Union Bank of South Africa Ltd v Woolf 1939 WLD 222 at 225, cited with approval in Myers v Abramson 1951 (3) SA 438 (C) at 451B-D; Amod v SA Mutual Fire & General Insurance Co Ltd 1971 (2) SA 611 (NPD) at 618A; See also Absa Bank Ltd v Public Protector and Several Other Matters (2018) 2 All SA 1 (GP) at paragraph [119]

mistake."[5]

[15] The power of the Court to allow material amendments is accordingly limited only by considerations of prejudice or injustice to the opponent. In *Devonia Shipping Ltd v MV Louis*[6] the Court held the following:

> *"The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for 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 notice of motion which it was sought to amend was filed..."*

[16] The considerations which a Court will take into account in exercising its discretion under subrule 28(4) of the Rules to grant or refuse an amendment were succinctly

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[5] Zarug v Parvathie NO 1962 (3) SA 872 (D) at 876A approved in GMF Kontrakteurs (Edms) Bpk and Another v Pretoria City Council 1978 (2) SA 219 (T) at 222D

[6] *1994 (2) SA 363 (C) 369F-I*

summarised by Caney J in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*[7]

[17] Notably, prejudice is *not* occasioned because the other party may lose his case against the party seeking the amendment. Such a consequence is not of itself *"prejudice"* of the sort which will dissuade the Court from granting an amendment.[8]

[18] Accordingly, the fact that the effect of allowing an amendment to the POC might result in the defeat of the Defendant's resistance to the Plaintiff's Particulars of

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[7] 1967 (3) SA 632 (D) at 637-641

> *"The primary principle appears to be 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. Overall, however, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. These observations, in all Provinces, make it clear, I consider, that 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, it seems to me, 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 supplicant, cap in hand, seeking mercy for his mistakes or neglect."*

[8] *South British Insurance Co Ltd v Glisson 1963 (1) SA 289 (D) at 294B; Amod v SA Mutual Fire & General Insurance Co Ltd 1971 (2) SA 611 (NPD) at 615A*

Claim, is not what is meant by *"prejudice"* which cannot be remedied by an appropriate order as to costs[9]. Save in exceptional cases where the balance of convenience or some such reason might render another course desirable, an amendment ought not to be allowed where introduction into pleading would render such pleading excipiable.[10]

[19] It was also held in *Trans-Drakensberg Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* by Caney J:

> *"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*

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[9] Stolz v Pretoria North Town Council 1953 (3) SA 884 (T) at 886H where Ramsbottom J held as follows:

> *"The general rule, as I understand it, is that an amendment to pleadings ought to be allowed if that can be done without prejudice to the other side or without any prejudice which cannot be remedied by an appropriate order as to costs. There is nothing before me to show that there would be any prejudice to the plaintiff by allowing this amendment. It is true that the effect of allowing the amendment might be to defeat the plaintiff's claim but that is not what is meant by prejudice."*

See also the more recent decision of Media 24 (Pty) Ltd v Nhleko (109/22) [2023] ZASCA 77 (29 May 2023) (SCA)at para [16].

[10] *Cross v Ferreira 1950 (3) SA 443 (CPD) at 450*

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, say perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable..."[11]

[20] To establish that the amendment will raise a triable issue the applicant for the amendment must show that:

20.1 the amendment raises a point of dispute which, if proved based on the evidence which the applicant presages in his application for amendment, would be viable or relevant; and

20.2 the amendment raises a point of dispute which, on the probabilities, would be proved by the evidence thus envisaged.[12]

Discussion

[21] In line with the directions of the Supreme Court of

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[11] *This passage has been repeatedly endorsed by the Courts, including the Supreme Court of Appeal in Ciba-Geigo (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA) at paragraph [34]*

[12] *See Ciba-Geigo (Pty) Ltd (supra) at paragraph [34]*

Appeal *("the SCA")*, this Court will attempt to be as succinct as possible and avoid any criticism of verbosity. As stated earlier in this judgment the Plaintiff relies on a fairly straightforward and simple case for the relief sought. It being common cause between the parties that, in law, an agent cannot act for and on behalf of a principal that did not yet exist the amendment sought by the Plaintiff is to allege that Cynamique acted as *principal* in favour of a company to be formed who subsequently became the Plaintiff and which, upon its incorporation, both ratified and adopted the agreement and accepted the benefits thereunder.

[22] It was further common cause between the parties that, in law *(not necessarily on the facts of this particular matter)*, it *is* competent for a party to act as principal in favour of a company to be formed. It is submitted on behalf of the Plaintiff that the purpose for the amendment is therefore to correct the error that took place in the finalisation of the POC where, through a *bona fide* mistake, the POC reflected that Cynamique acted as agent and not as principal in the sale agreement. This, says the Plaintiff, is explained in the Founding Affidavit in support of the application for leave to amend. The Plaintiff further submits that the

intention was always to act as principal for a company to be formed as is evident from subparagraph 8.1 of the POC. Subparagraph 8.1 of the POC reads as follows:

> *"At the time of entering into the sale agreement it was the intention of the parties to the sale agreement to contract for the benefit of a company to be formed by Cynamique."*

Moreover, it was submitted on behalf of the Plaintiff that the entire contents of paragraph 8 of the POC clearly amounts to the pleading of a classic *stipulatio alteri*.

[23] On behalf of the Defendant, it was submitted, in addition to the submission that the object of the amendment is *mala fide* and simply to overcome the excipiability of the POC, that the Plaintiff has failed to provide an adequate explanation for the proposed amendment. In this regard, it is trite that the Plaintiff's case for the amendment must be made out in the Founding Affidavit and not in reply. For this reason this Court will not become embroiled in the Defendant's application *(effectively an interlocutory application*

within an interlocutory application) that certain paragraphs in the Plaintiff's Replying Affidavit should be struck out. The merits of this application did not receive much attention from either of the parties and, further, this Court understood the Defendant's argument to be that even if those paragraphs were not struck out the application for the amendment should be dismissed.

[24] Focussing on the Plaintiff's Founding Affidavit, the deponent thereto states that *"...it was always the intention that Cynamique would act as a principal in favour of a company to be formed (which subsequently became the Plaintiff) in concluding the Sale Agreement"*. It is also averred that it is evident from a reading of the POC as a whole, that the intention was for Cynamique to act as principal in favour of a company to be formed and, most importantly, *"...any reference to an agency relationship in the particulars of claim was a purely bona fide mistake during the finalisation of the particulars of claim in late 2022..."*

[25] The Defendant, in the Defendant's Answering Affidavit, avers, *inter alia*, that the Plaintiff has failed to place before this Court sufficient facts to enable this Court, in the exercise of this Court's discretion, to grant the

amendment sought. In particular, it is averred on behalf of the Defendant that the Plaintiff does not identify who held the intention; whether this intention was held by all of the parties involved with the agreement or who represented the parties for the purposes of determining this intention.

[26] In the opinion of this Court, these criticisms by the Defendant must, ultimately, carry little or no weight. This is simply because, *inter alia*, the ground relied upon by the Plaintiff is a mistake or error committed on behalf of the Plaintiff by the Plaintiff's legal representatives. It is *this* error which is the subject matter of the application and *not* ultimately whether, factually, Cynamique acted as a principal or agent. Put another way, if the POC had reflected, when drafted and served upon the Defendant, that Cynamique had acted as principal and not as agent, then it would not have been necessary for the Plaintiff, at this early stage and before the Defendant has even pleaded, to deal with the facts as now raised on behalf of the Defendant. The Defendant has not *(correctly in the opinion of this Court)* called upon either the Plaintiff's attorneys or Counsel to place before this Court facts to support the Plaintiff's version that the POC contains an

averment which was erroneously pleaded and which, in law, renders the POC excipiable. Of course, if the amendment is granted the Defendant, when it pleads to the POC, will be entitled to raise, as an issue at trial, that Cynamique did not act as a principal.

[27] There is nothing before this Court to gainsay the averments made in the Applicant's Founding Affidavit that the averment in the POC that Cynamique acted as an agent was a genuine error on the part of those who drafted the POC. Further, insofar as the question of prejudice is a factor which should be taken into account by this Court, in light of the fact that, *inter alia*, the matter is at an early stage, there can, at present, be little or no prejudice to be suffered on behalf of the Defendant should the amendment be granted. With regard to the submission made on behalf of the Defendant, that should the amendment be granted the Defendant will be greatly prejudiced by incurring legal costs, it is the opinion of this Court that it is impossible *(if even appropriate)* to give any real weight *(especially at this very early stage of the proceedings)* thereto when this Court, in the exercise of its discretion, decides whether or not to grant the relief sought by the Plaintiff. This is simply because

of the numerous remedies available to the Defendant, both prior to and following upon the close of pleadings, in terms of, *inter alia*, the Rules. In contrast thereto, should this Court refuse to grant the amendment the prejudice to the Plaintiff is extreme. Effectively, the Plaintiff will be denied the right to have access to this Court, since the POC will clearly be excipiable.

[28] With regard to the submissions made on behalf of the Defendant that the agreement was cancelled prior to the Plaintiff having been able to accept the benefits created thereby, this Court has great difficulty in understanding how same can have any real bearing on the present application. This is because the aforegoing averment is a positive version asserted by the Defendant in the course of an objection based on extraneous facts. These facts are, in turn, allegedly based *(at present)* upon certain correspondence entered into between the parties. This Court cannot, without hearing evidence, interpret such correspondence and find *(as the Defendant requests this Court to do)*, that such correspondence illustrates that the POC, even in their amended form, would be excipiable *(and therefore no triable issue is raised)*.

This objection by the Defendant is not raised *ex facie* the POC read with the amendment sought by the Plaintiff.

Conclusion

[29] As agreed between the parties the *"crisp issue"* raised in this application for determination by this Court is whether the single amendment sought by the Plaintiff raises a triable issue. The issue is whether Cynamique acted as the principal for and on behalf of a company to be formed *(which ultimately was the Plaintiff)*, or not.

[30] On behalf of the Plaintiff, Adv Puckrin SC (with him, Adv Bester), submitted at a very early stage during the course of argument before this Court, that this Court should ultimately decide the matter on the pleadings and not on the extraneous evidence raised by way of the affidavits which form part of this application. Underlying this submission was the fact that in an application of this nature (an amendment of the POC), this Court must accept the version as set out in the pleadings. Further, Adv Puckrin submitted that if there was indeed any prejudice to the Defendant then same could be cured by an appropriate order as to costs.

[31] It was also submitted that any issues raised by the Defendant in its answering affidavit *(which the Plaintiff submitted carried very little weight in light of the fact that the deponent was not involved, at all, in the negotiations pertaining to the agreement)* should (and could) be properly dealt with by way of the Defendant's plea and/or special plea. In this manner, material issues in the action would be properly addressed at the trial by way of, *inter alia*, *viva voce* evidence of the parties actually involved in the negotiations pertaining to the agreement. Also, the parties would have the benefit of the discovery procedure, together with the numerous other *"benefits"* arising from the proper utilisation of the Rules. It was further submitted on behalf of the Plaintiff that the onus incumbent upon the Defendant, at this stage, to discharge, namely that the application to amend the POC was *mala fides*, was *(and this is trite)* an onerous one. In the words of Adv Puckrin SC, all of the aforegoing were material issues to be decided by the trial Court and not by this Court *(sitting as an "interlocutory" Court".*

[32]In response to the aforegoing and on behalf of the Defendant, Adv Franklin SC (with him Adv Watson)

submitted, *inter alia*, in light of the amendment sought, this Court had to take account of the contents of the affidavits filed in the application. It was further submitted, in response to a submission made on behalf of the Plaintiff that this Court could not decide this application merely on correspondence entered into between the parties, that even when deciding an exception, it is permissible to decide matters of interpretation if such an interpretation is sufficiently clear.

[33] As set out herein, the parties in this matter were *ad idem* in respect of the correct principles of law to be applied, in general, to applications in respect of an amendment in terms of subrule 28(4). In the premises, it falls upon this Court, having regard to the various submissions made by Counsel, to decide the present application by applying those principles to the facts.

[34] Whilst the criticism levelled by the Defendant against the Plaintiff that, *inter alia*, the Plaintiff has failed to set out sufficient grounds for the Court to grant the relief sought, may carry some weight, it is the opinion of this Court that same is not fatal to the success of this application. This is because, ultimately, the error made

by the Plaintiff's legal representatives who drafted the POC was not an error of fact but one of law. In the premises, as set out earlier in this judgment, there is very little that could have been added to the Plaintiff's Founding Affidavit that would have changed the decision that this Court has reached. It is trite that all legal principles must be applied to a particular set of facts. Further, when one looks at the nature of the amendment sought within the context of the POC as a whole, there is nothing to suggest that the application is *mala fides*.

[35] As to the apparent *"conflict"* raised by the parties, during argument, as to whether this Court should consider only the pleadings or the affidavits filed, it is the opinion of this Court that, in the exercise of its discretion and based on the facts of this particular matter, this Court is entitled, in the exercise of its discretion when deciding the matter, to take into account both. In that regard, the *reason* for the necessity of the Plaintiff to amend the POC is common cause. As to the *ground* of objection relied upon by the Defendant that no triable issue can be raised by an amendment since the agreement was cancelled prior to acceptance thereof by the Plaintiff, this Court finds that

(a) it cannot decide this issue on an interpretation of the correspondence entered into between the parties and (b) this difficulty is compounded by the fact that the deponent to the Answering Affidavit has no personal knowledge of the negotiations involved in respect of the agreement but *(this is common cause)* has deposed thereto on the basis of the annexures to that affidavit. The second reason is self-explanatory. As to the first, even if this Court did attempt to interpret same, it would be impossible *(as illustrated by the conflicting arguments put forward by both Counsel) to do so.* Reference to extraneous evidence is clearly needed in order to do so.

[36] In the premises, in the exercise of this Court's discretion, it is held that the application for the amendment of the POC should be granted. When making this finding, it is imperative to note that when exercising its discretion in favour of granting the said amendment, this Court has also considered the stage at which the amendment has been sought. This is at a very early stage and prior to the Defendant pleading. In this regard, the facts of this particular matter differ, in a material respect, to many of the authorities relied upon by the Defendant. Equally important is the issue

of prejudice. The only prejudice relied upon by the Defendant is that it will be put to great costs and inconvenience should the amendment be granted and the matter proceeds to trial. In the opinion of this Court, these are insufficient grounds *(alone)* for this Court to exercise its discretion in favour of the Defendant and dismiss this application. Any prejudice in this regard can be cured *(at the appropriate stage)* by a suitable order for costs in favour of the Defendant and the proper utilisation by the Defendant, of the Rules. On the other hand, considering the facts of this matter and in the exercise of its discretion, this Court must conclude that the prejudice to the Plaintiff would be extreme, should the application be dismissed.

Costs

[37] The applicable principles in respect of costs are trite and this judgment will not be burdened unnecessarily by setting them out herein. It suffices to say that Rule 28 makes provision for an applicant in an application of this nature to pay the costs on the basis that, *inter alia*, it is the party essentially seeking an *"indulgence"*.

[38] However, in this matter, the application was opposed,

thereby causing both parties to incur great costs. Despite this fact the Defendant has requested that the Plaintiff be ordered to pay the costs of the application even if successful. At the close of his address *(in reply)* Adv Puckrin SC submitted that the costs of the application should be reserved.

[39] In the opinion of this Court, it would be just and equitable if the costs of this interlocutory application be reserved for the decision of the trial Court finally determining the matter. Such an order would enable the Court to make a proper determination in respect thereof pursuant to hearing evidence pertaining to all of the issues in this matter.

Order

[40] This Court makes the following order:

1. The Applicant (Plaintiff in the action under case 2022-050904) is given leave to delete subparagraph 7.1 of the Plaintiff's Particulars of Claim and replace it with a new subparagraph which reads as follows:

"7.1 Cynamique acted as a principal in favour of a company to be formed, which subsequently became the plaintiff, and which upon its incorporation, both ratified and adopted the sale agreement and accepted the benefits thereunder; and".

2. The costs of this application are reserved for the court finally determining the action under case number 2022-050904.

[redacted]

B. C WANLESS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Appearances

For the Applicant:	Adv. C. E. Puckerin SC Adv. C. Bester
Instructed by:	Van der Merwe Doring Maponya Associates Inc.
For the Respondent:	Adv. A. E. Franklin SC Adv. D. Watson
Instructed by:	Bowman Gilfillan Inc.
Date of Hearing:	19 February 2024
Ex Tempore Judgment:	19 August 2024

Written Judgment: 18 September 2024