REPUBLIC OF SOUTH AFRICA

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

CASE NO: 12002/16

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

..... [redacted] ...13/01/2025.....
SIGNATURE **DATE**

In the matter between:

MEHDI BENCHERKI **PLAINTIFF/APPLICANT**

and

ERICSSON SUB-SAHARAN AFRICA (PTY) LTD **DEFENDANT/RESPONDENT**

In re: Application for Amendment

JUDGMENT

Manoim J

Introduction

[1] In this judgment I deal with three separate opposed applications. The plaintiff brings two of them – an application to amend his particulars of claim and a second, an application to lift the bar so as to permit him to file a replication. The defendant opposes both applications and in turn has brought an application to dismiss the plaintiff's claim.

[2] Although these are separate applications the factual matrix that underpins each one is similar. They are mutually destructive as a decision in favour of the plaintiff would mean I reject the application to dismiss whilst, vice versa, a decision to uphold the dismissal application requires a rejection of the amendment application and the removal of the bar on the replication. Of course, this need not be so; the rejection of an amendment would not ordinarily mean the matter could not still continue to trial. But the plaintiff has made it clear that without the amendment and removal of the bar he cannot proceed with the action.

[3] Before I consider the respective applications, it is necessary for me to outline as succinctly as possible the lengthy procedural history that has preceded the two applications.

[4] Twelve or fourteen years ago, the plaintiff, a Moroccan citizen now resident in Dubai, purportedly entered into an oral agreement in London, with the subsidiary of a Swedish multinational, Ericsson, concerning services he was to provide it with in Angola.

[5] The reason this court has jurisdiction, despite this set of facts, is that the subsidiary, Ericsson Sub-Saharan Africa (Pty) Ltd, the defendant, has its principal place of business in South Africa. The defendant does not contest this court's jurisdiction.

[6] The plaintiff describes himself as a business development consultant who specialises in telecommunications. The defendant company is a subsidiary of the well-known Ericsson group, which manufactures a wide range of telecommunications equipment which it sells worldwide.

[7] In his particulars of claim (prior to the amendment he seeks to make now) the plaintiff alleged that he had entered into an oral agreement with a certain Magnus Muchunguzi, then employed by the second defendant, in London, on 22 November 2014, to perform certain services to win business from three telecommunications companies operating in Angola, as well as with the Angolan Government. Mchunguzi, he alleges, was the Defendant's Vice-President and Managing Director; Major Accounts for South Africa and Sub-Saharan Markets.

[8] In a second claim he alleges he was retained at the same time to act as the defendant's intermediary in Angola.

[9] This judgment does not deal with the merits of his claim. What I have to decide are the applications brought by the respective litigants.

Procedural history.

[10] The plaintiff's action was brought to this court in April 2016. But it has had a troubled history since then. The plaintiff has sought to amend his particulars several times in the face of exceptions raised by the defendant. The defendant alleges that there have been several attempts by the plaintiff to amend his particulars. Only one of the defendant's objections was opposed by the plaintiff who was unsuccessful. The current particulars are nevertheless the product of an amendment. The defendant eventually pleaded in November 2019. In terms of the Uniform Rules the plaintiff should have filed his replication within fifteen days. He did not do so timeously, and this explains why he is now under bar.

[11] The defendant requested that the matter proceed in the Commercial Court. This was agreed to. What happened next was that the defendant brought an application to dismiss the claim. This application was heard in April 2024. The basis of the defendant's case was that the proceedings were vexatious and an abuse of process. Unterhalter J, who heard the matter, did not grant the application, holding that the threshold for dismissal in our law on the grounds that an action was vexatious and an abuse of process, was whether the proceedings were unsustainable as a certainty, rather than as a probability. Unterhalter J concluded that he could not conclude that the test for certainty had been met. Nevertheless, he was not unsympathetic to the defendants' argument given the history of delays in the matter and so rather than dismissing the application he gave an unusual order which is now the subject of much argument in the present matter.[1] The order states:

[1] The learned judge had discussed the proposed order with the parties who had both agreed to its terms.

> *"(i) The action brought under case no 12002/2016 is dismissed should the plaintiff henceforth engage in any conduct that unjustifiably delays the case coming to trial.*
>
> *(ii) If the action is dismissed pursuant to (i) above, the respondent (plaintiff in the action) shall bear the costs of this application; including the costs of two counsel.*
>
> *(iii) If the action is not dismissed pursuant to (i) above, the costs of this application are reserved for determination by the trial court.*
>
> (Emphasis provided).

[12] Unterhalter J made it clear that the order was not self-executing. This meant that if the defendant wished to seek dismissal it would have to bring another application and meet the standard that the plaintiff was responsible for an unjustifiable delay.

[13] Unterhalter J handed down his decision on 15 March 2024. A date was then sought from the Deputy Judge President for the matter to be allocated a trial date. The matter was set down for hearing for five days from 21 to 25 October 2024. This was an expedited date.

[14] What happened next is at the heart of the current dispute. According to the plaintiff he had by then become particularly anxious about the way his legal team – both his attorneys and counsel - were handling his matter. The date of trial was looming. Although discovery had taken place back in 2020, his attorneys delivered a Rule 35(3) notice, and this yielded a further tranche of documents.

[15] A whole series of interactions then took place between the plaintiff and members of his legal team. The interactions are numerous and show that he was distressed with their level of preparation whilst they tried to reassure him that they were on top of issues and would be trial ready. Ultimately the relationship broke down in mid-September 2024 and the plaintiff briefed a new legal team. Whether he fired them, or they decided the relationship had broken down beyond repair is not clear.

[16] The new legal team moved swiftly. The attorney briefed new counsel who acquainted themselves with the brief. At a pre-trial held on 3 October 2024 they informed the defendant's team that they were likely to file a replication and to amend the current pleadings. The new pleadings arrived simultaneously. The replication deals with the pleadings as they are, whilst the amendment raises new issues. Nevertheless, from the plaintiff's perspective they go hand in hand; the one does not exist in isolation of the other.

[17] The defendant then filed a notice of opposition to the amendment. I held a case management meeting with the parties a week before the trial was meant to commence. By then it was clear that the trial could only run if the plaintiff gave up on the amendment. He was not willing to do so. The defendant indicated that it was not willing to give up its opposition to the amendment and insisted that the plaintiff bring an application to amend. The defendant also indicated that it would bring another application to dismiss the claim. I then approved a timetable which provided for the following:

a. The plaintiff and defendant would file their respective witness statements with the following caveats: the plaintiff's were filed on the basis that the amendment was granted, whilst the defendant filed on the basis that the pleadings remained as they were.

b. The plaintiff would file an application to amend, and an application to remove the bar on his replication, whilst the defendant would oppose both and file a counter application to dismiss. The plaintiff in turn would oppose the application to dismiss.

[18] Despite the short time periods, both sides filed in time, and I heard both the applications on 23 October 2024. Both counsel sensibly argued the applications together. Formally they are distinct but the factual basis of each was largely co-extensive.

[19] I start by considering the applications to amend and to deliver the replication late.

The plaintiff's applications

[20] The plaintiff accepts that it must meet the threshold test set by Unterhalter J – it must show that the amendment does not unjustifiably delay the trial. That the trial would be delayed was not in dispute. That the plaintiff was the cause of the delay also cannot be seriously disputed. The question is whether the plaintiff's reason for the delay is unjustifiable. The central contention of the plaintiff is that the delay is caused by the incompetence of his erstwhile legal team. Only on the eve of the trial did he realise he needed to get new representation, and the

new legal team advised him that he needed both to replicate and to amend his particulars of claim.

[21] Relevant to the issue of justification is the nature of the replication and the proposed amendment. I consider this issue first.

[22] The plaintiff's current pleading, which as I noted earlier, is already the product of an amendment, has two claims. In terms of the first claim the plaintiff alleges that he entered into an oral agreement with the defendant which is described as a business development agreement. In terms of this the plaintiff was tasked with maintaining and expanding the defendant's market share in Angola. Specific mentions is made of certain telecommunications providers, amongst them a firm called Movicel. Also mentioned is the Angolan government. The contract was for three years, commencing on 1 January 2015 and terminating on 31 December 2017. The remuneration was calculated as $ 4 million per year as well as a percentage of business gained by the plaintiff from any of the entities mentioned. This fee was to be 5% of the sales arising from the agreement.

[23] The second claim was for the plaintiff to act as an intermediary to facilitate the release of funds by the central bank of Angola, the Banco Nacional de Angola ("BNA") that were due to Ericsson. The agreement was to run from 2015 to 2017, and Ericsson was to pay him $ 850 000 each year on the first day of the year.

[24] Importantly the plaintiff alleged that he had performed in respect of each of the agreements, but that Ericsson had, notwithstanding, failed to pay him. The combined claims amounted to $ 19.6 million.

[25] On 19 November 2019 the defendant filed its plea. In it the defendant raised three defences. That no agreement had been concluded, alternatively if there had been an agreement, Mchunguzi, the person who allegedly entered into it, was not authorized to do so, and further alternatively, if there was an agreement validly entered into, the plaintiff had not performed in terms of the agreement. No replication followed in the requisite fifteen-day period. Nor was one signalled when the dismissal application served before Unterhalter J.

[26] Instead, the replication and the proposed amendment followed shortly after the plaintiff had appointed his new legal team. It was a comprehensive change – a new attorney and two new counsel.[2] One can assume that these developments were made acting on their advice to the plaintiff.

[27] I deal with the replication first. It was only filed in October 2024 – nearly five years after the replication should have been filed in terms of the Uniform rules. The replication is responsive to the defendant's alternative allegation that Mchunguzi was not authorized to enter into a contract with him. In the replication the plaintiff pleads that Mchunguzi was authorized, but in the alternative, if he was not, then the defendant is estopped from asserting his lack of authority because two senior executives of Ericsson, a Mr Lars Linden, and

[2] The new attorney placed himself on record on the 20 September 2024.

a Mr Jejdling, were aware of the agreements, and that neither had informed the plaintiff that Mchunguzi was not authorised.

[28] The replication still deals with the pleadings as they stand. But the amendment reconstructs the case on a different basis.

Proposed amendment

[29] Under the current particulars the agreement was concluded on 22 November 2014 in London to regulate a future relationship between the parties. It is thus prospective. The amendment turns this clock around. Granted there is still an agreement entered into on that date, and it is still an oral agreement. But now the agreement is recorded as a compromise. The compromise becomes a synthesis of an earlier agreement, not previously pleaded, and a remaining prospective agreement.

[30] The earlier agreement now moves the alleged contract forward by two years, commencing in February 2012. It is again alleged to be an oral agreement. The contracting parties are still the plaintiff and again Mchunguzi. However, unlike with the London agreement, the contract was not formed at a single meeting. Instead, the plaintiff pleads that the contract was concluded over a period of time and not at one specific location. The essential terms were that Mchunguzi contracted the plaintiff to perform various consultancy services for Ericsson in Angola. I use the term Ericsson as opposed to merely the defendant because the agreement was purportedly for various entities in the Ericsson group.

[31] The first agreement was that the plaintiff was to assist various entities in the Ericsson group by having funds owing to them by their customers (including Movitel and Unitel) released by the national Bank of Angola ("BNA"). These funds had been held up because the Bank was experiencing a shortage of foreign currency. As payment for these services the plaintiff would receive 5% of any funds that he could secure the release of. The plaintiff alleges that during the period 2012 to 2105 he secured the release of $ 200 million hence entitling him to a fee of $ 10 million.

[32] The payments were not to be made to the plaintiff directly, but instead, thorough two intermediaries one based in Lebanon and the other through a company registered in Mexico. He alleges that these companies made various payments to him between 12 July 2012 and 24 June 2014.

[33] He then alleges the existence of a second agreement in which he was to assist the Ericsson Group to secure an agreement with Movicel, this meant replacing Movicel's then supplier, a Chinese company called ZTE, with Ericsson. If he succeeded, he would get 5% of the contract value. He says he procured the contract for Ericsson in February 2014.Since the contract was worth $ 95 million, he was entitled to receive $4.75 million. He alleges he was never paid for these.

[34] But this is where the recasting of the London agreement comes about in the proposed amendment. The London agreement still stands in the same terms as it was pleaded in the current version. But here is the key new allegation. It

is now reflected as a compromise of the prior agreements – those that were entered into before 2014.

[35] The case that it being made out now is that the London agreement is a fig leaf. The reason that it is a fig leaf is due to the problems of Ericsson. It had engaged intermediaries between the plaintiff and itself to effect payment. The reason for this indirect arrangement was so Ericsson could avoid scrutiny from international regulators. But the one intermediary failed to pay over monies owing to the plaintiff. Hence the compromise was to bury the past bad history and to recast it prospectively in terms that looked more favourable for governance issues from Ericsson's perspective and since the plaintiff was anxious to be paid, worked for him as well.

[36] In his witness statements and affidavit, the rationale for this unorthodox arrangement is given further justification. Ericsson despite its claims for the highest levels or corporate governance that it made much of in the previous dismissal application before Unterhalter J, has according to the plaintiff not practised what it preaches. The plaintiff has attached to his affidavits a deferred prosecution agreement the defendant's parent company, Telefonaktiebolaget LM Ericsson, had entered into with the United States Department of Justice regarding its activities in several countries. Factual issues differed depending on the country concerned. But the plaintiff has focussed on the statement of facts concerning what took place in Indonesia and Vietnam because it related to so called facilitation between the parent and various intermediaries. In it Ericsson makes certain admissions of contraventions of the US Foreign Corrupt

Practices Act. Central to the admissions is Ericssons apparent use of intermediaries in foreign jurisdictions to do what it does not wish to do itself.

[37] According to the US agreement Ericsson made payment to intermediaries who in turn would pay third parties *"… whom Ericsson employees knew would not pass Ericsson's due diligence processes*."[3]

[38] Thus, the plaintiff is paving the way for a similar fact argument that what happened in South East Asia was Ericsson's way of working in difficult jurisdictions, and hence giving his version in the proposed amendment some element of plausibility, as well as the reason why Ericsson allegedly adopted the compromise.

[39] But it is also alleged that the London agreement existed to cater for future business conducted between the parties. But in terms of a new allegation even if the defendant did not require these services, it was still required to make payment.

[40] But one of the most significant changes is the proposed amendment to the present paragraph 30 which deals with the defendant's breach. Under the current particulars of claim, the plaintiff alleged that he had complied with his obligations and that he had provided the services he alleged he provided. Recall the defendant had in its plea in one of the alternatives alleged that no services had been performed. In the proposed amendment the plaintiff has deleted this clause and replaced with the allegation that he had complied with

[3] Paragraph 83 of the Statement of Facts in the Deferred Prosecution Agreement.

the terms of the oral agreement "*…in that he had tendered to provide the services referred in paragraph 29.2 supra."* This is a reference to the services rendered in respect of the BNA payment clearance.

[41] There are other features that change such as the amount owed. But the question is even though there are some overlaps between the current version and the proposed version, is there now a new cause of action.

[42] The defendant identifies five material changes between the versions:

a. The nature of the business development agreement changes.
b. The period of time over when events happened including when the plaintiff provided these services.
c. The Ericsson entities to whom the services were provided.
d. A change in the nature of performance from performing to tendering perform.
e. A change in the case on authority.

[43] The plaintiff has argued that the amendments were designed to meet the evidence that is set out in the documents and which the erstwhile legal team had, for reasons not explained, failed to identify as his true case. But the defendant argues that the amendments were brought about to identify the gaps in the case that they had made out in their plea. Essentially the amendments seek to meet two problems they had identified – the fact that no documents indicate that the plaintiff had performed, whilst the replication was designed to meet the challenge to Mchunguzi's authority by bringing in others from Ericsson.

Analysis

[44] In terms of the Unterhalter order the plaintiff must meet the test that he does not *unjustifiably delay[s] the case coming to trial*.

[45] It is common cause that the trial would have to be delayed. The plaintiff seeks to justify the delay by blaming his erstwhile legal team both for their lack of preparation and lack of attention to the documentary record that had been discovered.

[46] Most of the plaintiff's efforts have gone into discrediting the previous legal team and showing how he diligently kept the pressure on them to properly prepare for trial, yet notwithstanding his efforts from afar they failed to do so. Since the previous legal team are not parties to the present application and the defendant is not in a position to know what happened since it is an attorney-client matter, I have to accept the version of the plaintiff on the following points. That he was unhappy with the efforts of his past legal team and that despite diligent attempts to engage with them he justifiably withdrew their instructions and engaged his new legal team who made their best efforts in a short period of time to draft the new amendment, the replication and prepare papers in the respective applications.

[47] But this is only part of what the plaintiff is required to explain. He is also required to explain why his new version has come at the eleventh hour. The plaintiff sent out his letter of demand in this matter as long ago as 2015 and instituted the action in 2016. Since that date there were numerous attempts to amend his pleadings some of which failed whilst others were abandoned. But notably in

none of these attempts did he put forward the version he is now advancing in the amendment application. That requires an explanation. This is not simply a change in the technical aspects of the pleadings where such an explanation may have been explained on the basis that he is a peregrinus in this jurisdiction or someone unfamiliar with our legal system or who does not speak English as his first language.

[48] The plaintiff argues that the changes are not substantial. The *facta probanda* are the same; there is just a change in the *facta probantia*. But even it is, that is not the point. The case the plaintiff now contends for is based on a revised history of the interactions between him and the defendant. The central plank of his current case, the London agreement, is no longer to be considered as the original agreement, but as a product of a compromise of previous agreements. That is a substantial change because not only have the pleaded terms been amended but the context and purpose of the agreement have changed as well.

[49] Second the plaintiff argues a process point. The history of the litigation prior to the Unterhalter J judgment he argues must be ignored. As his counsel have put in their heads of argument it is an issue of subject estoppel. Only the events after the date of the judgment are relevant to the test of justification. Whilst I accept that there must be events that have taken place after that date that form part of the analysis, ignoring the history, as if the judgment wiped the slate clean is wholly artificial and unfair to the defendant. In determining whether a substantial amendment now is justified it is wholly proper to consider the past history of the case including attempts to amend. That is relevant to the question of why this has happened now, and not earlier, given the ample opportunity the

plaintiff had to do so. To pass the test for justification the plaintiff needed to explain this. He has failed to do so.

[50] Nor is there any satisfactory explanation for the late filing of the replication nearly five years after it was to be filed in terms of the rules. The replication is also not without significance as it implicates two further executives of Ericsson for the first time. Again, no explanation is given for why this information was not provided much earlier. While the plaintiff is not required to be familiar with notions such as ostensible authority, he does know who he was dealing with and that this was in issue since the plea was filed in November 2019.

[51] Nor is the fact that English is not his first language. The emails show that he regularly communicated and received communication from various of the intermediaries and others in English. As is evident from the content of these emails he does not lack business sophistication. The plaintiff's legal team quotes from the decision of Heher JA in *Madinda v Minister of Safety and Security* on the meaning of good cause.

[52] There the learned judge states:

> *"It is enough for present purposes to say that the defendant must at least furnish an explanation for his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives"*[4]

[4] *Madinda v Minister of Safety and Security* [2008] 3 All SA 143 (SCA), at paragraph 11.

[53] But this is what is lacking in the present matter – a lack of a sufficient explanation on the core issue – why was the present explanation not forthcoming any earlier in this litigation. And most clamant of all the omissions – was this version told to the previous legal team. It is not enough to say that the erstwhile legal team had the discovered documents and should have properly appreciated the case as it is now in terms of the proposed amendment. This is a case based on an oral agreement in either the current version or the proposed amendment. If it was, and it has all the conduct now proffered on the form of the compromise explanation this must have required him to explain this to his legal team. Nowhere in his lengthy affidavit identifying their missteps does he say this.

[54] As the defendant points out most of his final interactions with his erstwhile legal team refer to their trial readiness not the need to amend the pleadings to reflect the 'correct version'.

[55] The ability of litigants to blame past representatives for their difficulties has been well articulated in the *Saloojee* case which is still good law. There the court held that a litigant is:[5]

> *"entitled to hand over the matter to his attorney and then wash his hands of it."*

[56] But the court went on to state:

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[5] *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C.

> *"…If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."*

[57] The plaintiff has here given only a partial explanation. Whether that suffices to justify condonation for the late amendment also depends on the case on the merits. Here Heher JA stated again in *Madinda* that:

> *"Strong merits may mitigate fault; no merits may render mitigation pointless."* [6]

[58] I go on to consider the merits.

The merits.

[59] The factual issues to be considered here are equally relevant to a consideration of the dismissal case. I consider both now.

[60] The first issue I have to consider is what test I must apply to the dismissal application. The existing test, which was applied by Unterhalter J, is the one set out in the case of *African Farms.*[7] That test for whether the legal proceedings are vexatious, and an abuse of process, is whether they are unsustainable as a matter of certainty rather than merely on a preponderance of probability.

[61] The first question I have to answer is whether I should apply this test to the dismissal application, or the test set out in the order of Unterhalter J, namely

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[6] *Madinda* supra, paragraph 12.
[7] *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565.

that the plaintiff engages in *"conduct that unjustifiably delays the case coming to trial"*

[62] It is clear that this latter test is less demanding than the certainty test laid down in *African Farms*. In explaining the order Unterhalter J said the following:

> *"I recognize that an order of this kind is not self-executing. The order of dismissal only comes into effect if Mr Bencherki unjustifiably delays the matter coming to trial. That may require a court to decide whether Mr Bencherki has so acted. But it does not alter the finality of the order I propose to make. If a court finds that Mr Bencherki has acted in a fashion contrary to what the order requires of him, then the consequence, dismissal, follows."*

[63] To the extent that this order of Unterhalter J could be construed to dilute the test for dismissal set out in *African Farms,* which has long been accepted, I will nevertheless apply it, albeit I will approach its terms strictly.

[64] There were two periods relevant to the period since that judgment was delivered. The first period was when the previous legal team was representing the plaintiff. That legal team on the plaintiff's version failed to act expeditiously in getting the case ready for trial. The email correspondence that has been disclosed shows that the plaintiff was pressing them for answers on preparation on a regular basis and became frustrated with what he considered their lack of urgency. That legal team is not before me. I do not have their views on the matter. As it stands, I only have the plaintiff's version which paints them in a most unfavourable light. But since I cannot test this version on papers, I must

accept that the plaintiff has been let down by them despite his continual prodding. What borders on the unjustifiable is the plaintiff's failure to explain whether he had disclosed the version proposed in the amendment application to the erstwhile legal team. Whilst this conduct is worthy of criticism, I consider that it is adequately remedied by an adverse costs award as go on to discuss below. It does not on its own constitute a basis for founding as extreme a remedy as an order of dismissal.

[65] As far as the second period is concerned, the new legal team, as I remarked earlier, have acted expeditiously, and prepared diligently; inter alia analysing documents, procuring witness statements, and bringing and responding to applications under tight deadlines.

[66] If they have correctly advised the plaintiff that an amendment was necessary, then a further delay was justifiable. That entails a consideration of the whether the record discloses some evidential basis for the proposed amendment and replication. I go on to consider this.

[67] Since the plaintiff's case is based on an oral agreement which was allegedly concluded some twelve years ago, the documentary record, largely in the form of email correspondence, will prove highly probative.

[68] The plaintiff has attached a list of 149 documents which he alleges are the essential documents in the trial bundle. In his affidavit he traces a number of these emails which are at least consistent with, if not conclusive of his version in the proposed amendments and which predate the London agreement.

[69] From these which involve Mchunguzi and another Ericsson person Adam Hashem, the Vice President major accounts for West Africa, it is apparent that the plaintiff was seen as someone well connected in Angola. He is described by Mchunguzi in one email dated September 2012, as "*our man for Angola and we have dropped other pretenders."*

[70] Much of this earlier correspondence is with the alleged intermediary between the plaintiff and Ericsson, a certain Thomas Schultz, since deceased. Shultz variously in his correspondence with the plaintiff refers to his brief to get funds out of Angola for the defendant and that this would lead to payment of 5%. He also promises that a contract was being drafted.

[71] The emails also show that some senior Ericsson staff other than Mchunguzi were also aware of the plaintiff. For instance, Lars Linden, who the plaintiff describes as Ericsson's Head of Sub- Saharan Africa, wrote an email in October 2012 to Thomas Schultz enquiring as to whether the plaintiff could help them in Angola getting money from a "*Tota bank"*.

[72] Given that the London agreement is alleged to have taken place on 20 November 2024 it is instructive to consider the terms of the first email in the record from the plaintiff to Mchunguzi which followed that meeting. Here the plaintiff writes as follows on 22 November 2014.

> *"Dear Magnus, I am glad we had the opportunity to meet in London to finalize. As we went through the details, <u>the conclusion agreed</u> is: -Contract to be signed by Ericsson before end of year covering the following: 3 year contract for clearance (shifted from*

% to fixed fee) (Annually fixed fee of 850,000 USD) to be paid effective Jan 2015, Jan 2016, Jan 2017 Awaiting the contract for signature by next week. Best Regards, (emphasis provided).

[73] This email is sufficiently ambiguous to be open to contending interpretations. It may suggest no prior agreements existed prior to the London agreement. Alternatively, the phrase '…*the conclusion agreed'* could mean that they had agreed on a compromise and thus be consistent with the version in the proposed amendment.

[74] There is of course no documentary proof of any of the agreements, but it is the plaintiff's version that there were none because of the fact that this was Ericsson's modus operandi in dealing with difficult jurisdictions. Hence the plaintiff makes much of the deferred prosecution agreements in the United States, with the Department of Justice. This may be a case where the plaintiff still faces major challenges complicated by the involvement as intermediary of the late Thomas Schulz. But what is new are witness statements proffered by the plaintiff, including an unusual, taped interview with the main role-player for the defendant, Mchunguzi, which can be best described as a consummately skilful act of fence-sitting. Thus, a key witness while not supporting the plaintiff's version does not refute it either.

[75] As far as the replication is concerned the plaintiff has alleged that at least 16 other Ericsson personnel (apart from Muchunguzi) either had some interaction with the plaintiff or discuss him internally. Thus, the case of ostensible authority has some foundation in the record.

[76] Because the plaintiff has dealt in its witness statement (it filed only one) with the case as it is it has not dealt with the content of any of the emails. The sole witness statement from Raymond Rademaker the Business controller for the defendant who says he was involved in its Angola business from 2015 to 2017 said he had never come across or heard of the plaintiff. He also states that Mchunguzi would not have had the authority to contract without a board resolution. But this serves merely to join issue with the plaintiff and does not serve to refute what is contained in the documentary record.

[77] To summarise. The plaintiff has through the emails and witness statements provided evidence of prior contact with various functionaries of Ericsson commencing two years prior to the London agreement. Based on the US deferred prosecution agreement he advances a theory of why no formal contract was entered into and the reason why the London agreement constituted a compromise. These are at least the ingredients of a triable case.[8]

[78] But there is yet another issue. The defendant contends that if the case is now based on a cause of action commencing in 2012 then the case has prescribed; at least as far the first claim in the proposed amendment is concerned. This is because the summons was only issued in 2016. The debate between the parties was whether this summons interrupted prescription for the purpose of amendment. It is of course trite law that an amendment which is excipiable cannot be granted. The plaintiff contends that the question is when the debt arises not when the cause of action arose. Given the compromise of 2014 the

[8] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* (2002) SA 447 (SCA) 447 at paragraph 34, where the court considers the case law on what constitutes a triable issue when it comes to an amendment.

debt arose then. The defendant argues to the contrary. But this debate requires evidence and should not be decided as if it were an exception. I consider this point cannot presently be decided and must wait for trial. The potential prescription issue therefore cannot be a basis for refusing to grant the amendment.

[79] Thus, the action for dismissal must fail; whether or not the test is conclusiveness or unjustifiable delay. This then leaves the question of what to do about the amendment application and the replication application. Technically they are separate self-standing applications. But if I were to limit myself to refusing to grant the dismissal application and not grant the plaintiff his two applications, this would leave this case in limbo. The plaintiff cannot run his case on the current version. His legal team have made this clear. Refusing his two applications would amount to indirectly granting the dismissal application. I thus see no other option but to allow the amendment application and the condonation for the late filing of the replication.

[80] That does not mean that the plaintiff should get his costs. On the contrary the lateness of the application, after a history of prevarication by the plaintiff in this litigation, coupled with the absence of a proper explanation as to whether the new version was given to the prior legal team, are issues for which the plaintiff should be held accountable. Even if at best for him the prior legal team is responsible for its failure to appreciate what his true cause of action was, there is no reason that the delay now occasioned should be held against the defendant. He chose at the eleventh hour to change his representation and to come with a new version. He is responsible for both these decisions.

[81] The defendant was well-justified in opposing the applications to amend and for condonation for the late filing of the replication, for the reasons I explained earlier.

[82] For this reason, I am awarding the defendant the costs of these two applications. Both sides employed two counsel including senior counsel, so this cost is justified, as well on Scale C. The defendant was also justified in seeking dismissal, albeit unsuccessfully. I could not justify giving it costs for this application, since it proved unsuccessful, but I also would not make an adverse costs award against it. For this reason, I will make no costs award in respect of this application.

ORDER: -

[83] In the result the following order is made:

1. The plaintiff/applicant is granted leave to amend his particulars of claim in accordance with the notice of intention to amend dated 9 October 2024.
2. The plaintiff/applicant's statement of claim delivered on 9 October 2024 shall stand as a statement of claim as contemplated in paragraph 20 of the Commercial Court Practice Directives of this Court dated 2 June 2022.
3. The plaintiff/applicant's late delivery of his replication is condoned.
4. The defendant/respondent is permitted to, within 20 days hereof:
    a. to deliver a consequently amended plea;
    b. alternatively, to (a), to deliver a responsive statement of case as contemplated in rule 21 of the Commercial Court Practice Directives of this Court dated 2 June 2022.

5. The defendant's application for dismissal is dismissed. There is no order of costs made in respect of that application.
6. The plaintiff is liable for the defendant's costs in respect of the application to amend, and the application for condonation of the late delivery of the replication and the upliftment of the bar, with costs of two counsel, including one senior, on Scale C.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHNANNESBURG

Date of hearing: 23 October 2024

Date of Judgement: 13 January 2025

Appearances:

Counsel for the Plaintiff/Respondent:	N A Cassim SC
	M Mostert
Instructed by:	Shaheed Dollie Inc
Counsel for the Defendant/Applicant:	C Watt-Pringle SC
	P Smith
Instructed by:	Bowman Gilfillan Inc