IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: 2277/09

In the matter between:

JAZIRA HOLDINGS LTD	PLAINTIFF
and	
WONDERFLOORING (PTY) LTD	FIRST DEFENDANT
SALEEM MOHAMED THOKAN	SECOND DEFENDANT
AKTHAR THOKAN	THIRD DEFENDANT
ABDOOL MAJEED DAWOOD	FOURTH DEFENDANT
MUKHTAR AHMED DAWOOD	FIFTH DEFENDANT
ANWAR ISMAIL DAWOOD	SIXTH DEFENDANT
SEA EDGE INVESTMENTS (PTY) LTD	SEVENTH DEFENDANT
INDABA INVESTMENTS (PTY) LTD	EIGHTH DEFENDANT

JUDGMENT

Delivered on: 12 August 2015

MNGUNI J

[1] This is an interlocutory application brought under Rule 28 of the Uniform Rules of this court in terms of which the applicant (the plaintiff in the

action) seeks leave to amend its particulars of claim. The application was brought after the pleadings in the action had closed. The applicant failed to lodge this application within 10 days of the defendants' objections to its proposed amendments as required by Rule 28 (4). Allied to the application for leave to amend is therefore an application for an extension of the period for the filing of the application for leave to amend, alternatively, for condonation of the applicant's late filing thereof.

[2] The relief sought is opposed by the first to third respondents (the first to third defendants in the action). For ease of reference I shall refer to the parties by their designations in the action. I shall also refer to the first to third respondents collectively as the defendants.

[3] The background facts underlying this application are the following: On 11 February 2009 the plaintiff caused summons to be issued against the defendants[1] claiming damages allegedly suffered as a result of misrepresentations made to Mr Bagash (the Director of the plaintiff) by the defendants which caused the plaintiff to enter into various agreements and to invest substantial amount of money in what the plaintiff had been told would be property development ventures in South Africa. In the process the plaintiff lost such money. The defendants entered appearances to defend the action and subsequently delivered their pleas.

[1] Including other defendants who take no part in this application.

[4] On 28 July 2011 the plaintiff and the sixth defendant settled the dispute between them on the basis that the sixth defendant would pay to the plaintiff the US$ equivalent of R6 050 000 which was duly done by the sixth defendant. As a result of the settlement between the plaintiff and the sixth defendant, the plaintiff's action against the sixth defendant will not proceed further. For this reason and other reasons which will become apparent in the course of this judgment, the plaintiff contends that it has become necessary for it to effect certain amendments to its particulars of claim.

[5] According to Mr Bagash, (deponent to the plaintiff's founding affidavit) during the course of 2013 he, on the advice of the plaintiff's attorneys, considered it appropriate to have the plaintiff's case reviewed and reconsidered by further counsel who had not been involved in the matter up until that stage. Pursuant to that on 8 and 9 November 2013 Mr Bagash consulted with Mr *Breitenbach* SC in Mumbai, India. Arising from that consultation and the review of the pleadings by Mr *Breitenbach*, it was considered necessary by the plaintiff on the advice of its legal representatives to effect certain further amendments to its particulars of claim.

[6] On 6 February 2014 the plaintiff filed a notice in terms of Rule 28 (1) containing the proposed amendments to its particulars of claim. In view of the importance of these proposed amendments, it is important to set them out in full and they are as follows:

> '1. adding, after the existing portion of paragraph 7, the following sentences:

"After the issuing of the summons in this matter on 11 February 2009, more specifically on 28 July 2011 the Plaintiff and the Sixth Defendant settled the dispute between them. Consequently, the Plaintiff has withdrawn the action against the Sixth Defendant and all references to the Sixth Defendant herein are included for completeness sake not to substantiate any current claim against the Sixth Defendant.";

2. replacing paragraph 11 with the following paragraph:

"11. Between about May 2005 and about January 2006 the Second Defendant and the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, invited Ali Mohammed Bagash ("Bagash"), to lend, either himself or through an entity established by him for that purpose, US $3.5 million to the Seventh Defendant and US $10 million to the Eighth Defendant.";

3. replacing paragraph 12(1) with the following paragraph:

"12.(1) In order to induce Bagash or that entity to make the loans, the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, made the following material representations:

12(1).1 the Seventh and Eighth Defendants were property development companies controlled by an entity called Indawo investments;

12(1).2 Indawo Investments had a team of executives from diverse business segments, comprising the Second to Sixth Defendants and one Albert Lourens ("Lourens"), a. quantity surveyor;

12(1).3 the Second and Third Defendants were, respectively, the Managing Director and Financial Director of the First Defendant;

12(1).4 the First Defendant was:

12(1).4.1 part of a group with an asset base in excess of US $250 million; and

12(1).4.2 the main financier of Indawo Investments;

12(1).5 in addition to the property developments to be undertaken through the Seventh and Eighth Defendants, Indawo investments was busy with property developments on other properties at a total cost of about US $100 million;

12(1).6 Indawo investments had already completed several projects in KwaZulu-Natal, including a new multi-storey mixed-use building in Umhlanga, KwaZulu-Natal, called Horizon Views;

12(1).7 the Seventh Defendant intended to use the US $3.5 million to buy out an outside group of investors who had put up the money used by the Seventh Defendant to acquire a development property of about 5.4 hectares in extent at Ilala Ridge in La Lucia, KwaZulu-Natal ("the llala Ridge property");

12(1).8 the Seventh Defendant:

12(1).8.1 had purchased the Ilala Ridge property;

12(1).8.2 had obtained all the official approvals, except for building plan approvals, that were necessary for its development as an upmarket residential estate;

12(1).8.3 could not start the development until it received the US $3.5 million and bought out the outside investors; and

12(1).8.4 intended, once it started, to undertake the development on a 'fast track' basis;

12(1).9 the Eighth Defendant intended to use the US $10 million to acquire ownership of a development property of about 62 hectares in extent in Umdlothi, KwaZulu-Natal ("the Umdlothi property");

12(1).10 the Eighth Defendant:

12(1).10.1 had concluded a contract for the purchase of the Umdlothi property;

12(1).10.2 had paid a deposit of US $2 million to the seller;

12(1).10.3 required the US $10 million to pay the balance of the purchase price (US $8 million) and to refund the First Defendant which had put up the money for the deposit (US $2 million);

12(1).10.4 intended to develop the portion of the property not covered by indigenous forest (which could not be disturbed by development) into a large, upmarket residential estate;

12(1).10.5 required an environmental authorisation for the development, which it was likely to obtain in about March 2006; and

12(1).10.6 required the US $10 million by May 2006, otherwise it would lose the opportunity to buy the property and the US $2 million deposit it had paid;

12(1).11 the Seventh and Eighth Defendants did not need to encumber their properties with development bonds because the First Defendant, which was the main financier of property developments undertaken by Indawo Investments, intended to provide the Seventh and Eighth Defendants with the money needed to pay for the development of the properties.";

4. replacing paragraph 12(2) with the following paragraph:

"12(2). The representations described in paragraph 12(1) were made to Bagash and/or the Plaintiff on one or more of the following occasions:

12(2).1 on about 18 May 2005 in an email from the Second Defendant to Bagash;

12(2).2 between about 18 May 2005 and about 11 November 2005 in telephone conversations between the Second Defendant and Bagash;

12(2).3 on about 12 and 13 November 2005 during a meeting in Dubai attended by the Second and Third Defendants, Lourens and Bagash;

12(2).4 between about 14 November 2005 and about 14 December 2005 in telephone conversations between the Second Defendant and Bagash;

12(2).5 on about 15 December 2005 during a meeting in Dubal attended by the Second and Third Defendants and Bagash; and

12(2).6 on about 12 to 16 January 2006 during meetings in Johannesburg and Durban attended by Second, Fourth, Fifth and Sixth Defendants and Bagash.";

5. replacing paragraph 13 with the following paragraphs:

"13(1). When making the representations referred to in paragraph 12(1) above, the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, were aware that the representations were false in the respects specified below:

13(1).1 the representation referred to in paragraph 12(i).4.1 above was false because the group, alternatively, the First Defendant, which was the largest entity in the group, was worth less than R50 million;

13(1).2 the representation referred to in paragraph 12(1).5 above was false because Indawo Investments was busy with property developments on other properties at a total cost of no more than R100 million;

13(1).3 the representation referred to in paragraph 12(1).7 was false because the First to Sixth Defendants actually intended causing the Seventh Respondent to pay the money, alternatively a substantial portion of the money, directly, or indirectly through other entities:

13(1).3.1 to the First Defendant;

13(1).3.2 to various trusts and other entities associated with the Second and Third Defendants and/or members of their families;

13(1).3.3 to various trusts and other entities associated with the Fourth to Sixth Defendants and/or members of their families and/or Lourens; and/or

13(1)3.4 to various other companies owned or controlled by the Indawo Investment Trust;

13(1).4 the representation referred to in paragraph 12(1).8.1 above was false because the Seventh Defendant only purchased the Ilala Ridge property in November 2006;

13(1).5 the representation referred to in paragraph 12(1)8.2 above was false because the Seventh Defendant had not obtained any official approvals for the development of the Ilala Ridge property;

13(1).6 the representation referred to in paragraph 12(1).9 above was false because the First to Sixth Defendants actually intended causing the Eighth Defendant to pay the money, alternatively a

substantial portion of the money, directly or indirectly through other entities:

13(1).6.1 to the First Defendant;

13(1).6.2 to various trusts and other entities associated with the Second and Third Defendants and/or members of their families;

13(1).6.3 to various trusts and other entities associated with the Fourth to Sixth Defendants and/or members of their families and/or Lourens; and/or

13(1).6.4 to various other companies owned or controlled by the Indawo Investment Trust;

13(1).7 the representation referred to in paragraph 12(1).10.2 above and the consequent representation referred to in paragraph 12(1).10.3 above were false because the amount of the deposit was R2 million.

13(2). When making the said representations, the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, intended that Bagash or the entity established by him would act on some or all of the said representations by making the loans to the Seventh and Eighth Defendants referred to in paragraph 11 above and thereby prejudice himself or that entity, and made such representations unlawfully and in breach of their duty not to mislead Bagash or the Plaintiff.

13(3). In the alternative to paragraphs 13(1) and 13(2) above, the Plaintiff avers that by the time of the establishment of the Plaintiff by Bagash on 19 December 2005 as the entity which would make the loans, the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, knew:

13(3).1 of the falsity of the representations referred to in paragraph 12(1) above;

13(3).2. the true facts were as set out in paragraphs 13(1).1 to 13(1).7 above;

13(3).3 that the Plaintiff did not know of the falsity of the representations and did not know the true facts; and

13(3).4 that if the Plaintiff acted on the truth of some or all of the said representations and in ignorance of the true facts by making the loans to the Seventh and Eighth Defendants referred to in paragraph 11 above, the Plaintiff would thereby prejudice itself.

13(4). Further to paragraph 13(3) above, the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants:

13(4).1 had a duty to inform the Plaintiff of the falsity of the representations and of the true facts; and

13(4).2 despite this duty, intentionally and unlawfully failed to so inform the Plaintiff.";

6. replacing paragraph 14 with the following paragraph:

"14. Relying on the truth of the representations referred to in paragraph 12(1) above and as a result of one or more or all of the representations, or alternatively as a result of one or more or all of the non-disclosures referred to in paragraphs 13(3) and 13(4) above:

14.1 on 19 December 2005 Bagash caused the Plaintiff to be incorporated and registered, with himself as the sole shareholder;

14.2 on 20 December 2005 Bagash, acting on behalf of the Plaintiff, signed the written agreements with the Seventh and Eighth Defendants referred to in paragraphs 15 and 18 below;

14.3 on 21 December 2005 Bagash, acting on behalf of the Plaintiff, transferred to the bank account of the Seventh Defendant the US $3.5 million loan referred to in the written agreement with the Seventh Defendant; and

14.4 on 14 March 2006 Bagash, acting on behalf of the Plaintiff, transferred to the bank account of the Eighth Defendant US$ 7.5 million of the US $10 million loan referred to in the written agreement with the Eighth Defendant.";

7. replacing paragraph 15 with the following paragraph:

"15. On 28 December 2005 and at Durban the Plaintiff, duly represented by Bagash, and the Seventh Defendant, duly represented by the Fourth Defendant, concluded a written agreement, a copy of which is annexed hereto and marked "A".";

8. replacing paragraph 16 with the following paragraph:

"16. The said agreement between the Plaintiff and the Seventh Defendant (annexure "A" hereto) was signed by Bagash on behalf of the Plaintiff in Dubai on 20 December 2005 and by the Fourth Defendant on behalf of the Seventh Defendant on 28 December 2005.";

9. replacing paragraph 17 with the following paragraph:

"17. The material terms of the said agreement between the Plaintiff and the Seventh Defendant (annexure "A" hereto) included the following:

17.1 the Plaintiff would lend US $3.5 million to the Seventh Defendant (clauses 1 and 4);

17.2 the purpose of the loan was to finance the purchase of land for selected developments in KwaZulu-Natal (clause 3);

17.3 the Seventh Defendant would repay the capital amount of the loan at the end of the 18th month after the draw down of the initial loan amount (clause 5.1.1.);

17.4 the Seventh Defendant would pay the Plaintiff 50% of the profits realised in each of the applicable projects (clauses 3 and 5);

17.5 the Plaintiff would be paid its share of the profits in two tranches, namely:

17.5.1 a first instalment of 8% per annum of the initial loan amount, payable together with the capital amount at the end of the 18th month after the draw down of the initial loan amount (clause 5.1.1);

17.5.2 the balance in the 42nd month after the draw down of the initial loan amount (clause 5.1.2):

17.6 should unforeseen circumstances arise, the repayment of the loan amount and the profit share could be delayed by a maximum of three months (clause 8.6);

17.7 as security for the loan, the Seventh Defendant would procure the cession to the Plaintiff of 50% of the shares in the relevant property holding company (clause 6); and

17.8 the seventh Defendant would pay the Plaintiff a loan raising fee of 3% of the total loan amount, to be paid on the first draw down of the development loan for the development costs of a specific project from the commercial bank (Absa) and which shall form part of the cost of the project (clause 7).";

10. replacing paragraph 18 with the following paragraph:

"18. On 28 December 2005 and at Durban the Plaintiff, duly represented by Bagash, and the Eighth Defendant, duly represented by the Fourth Defendant, concluded a written agreement, a copy of which is annexed hereto and marked "B".";

11. replacing paragraph 19 with the following paragraph:

"19 The said agreement between the Plaintiff and the Eighth Defendant (annexure "B" hereto) was signed by Bagash on behalf of the Plaintiff in Dubai on 20 December 2005 and by the Fourth Defendant on behalf of the Eighth Defendant on 28 December 2005.";

12. replacing paragraph 20 with the following paragraph:

"20. The material terms of the said agreement between the Plaintiff and the Eighth Defendant (annexure "A" hereto) included the following:

20.1 the Plaintiff would lend US $10 million to the Eighth Defendant (clauses I and 4);

20.2 the purpose of the loan was to finance the purchase of land for selected developments in KwaZulu-Natal (clause 3);

20.3 the Eighth Defendant would repay the capital amount of the loan at the end of the 18th month after the draw down of the initial loan amount (clause 5.1.1.);

20.4 the Eighth Defendant would pay the Plaintiff 50% of the profits realised in each of the applicable projects (clauses 3 and 5);

20.5 the Plaintiff would be paid its share of the profits in two tranches, namely:

20.5.1 a first instalment of 8% per annum of the initial loan amount, payable together with the capital

amount at the end of the 18th month after the draw down of the initial loan amount (clause 5.1.1);

20.5.2 the balance in the 42nd month after the draw down of the initial loan amount (clause 5.1.2);

20.6 should unforeseen circumstances arise, the repayment of the loan amount and the profit share could be delayed by a maximum of three months (clause 8.6);

20.7 as security for the loan, the Eighth Defendant would procure the cession to the Plaintiff of 50% of the shares in the relevant property holding company (clause 6); and

20.8 the Eighth Defendant would pay the Plaintiff a loan raising fee of 3% of the total loan amount, to be paid on the first draw down of the development loan for the development costs of a specific project from the commercial bank (Absa) and which shall form part of the cost of the project (clause 7).";

13. replacing paragraph 21 with the following paragraph:

"21. On about 25 April 2006 and at Umhlanga the Second Defendant and the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, presented Bagash with two unsigned written agreements and requested that he sign them on behalf of the Plaintiff.";

14. replacing paragraph 22 with the following paragraph:

"22 In order to induce Bagash to sign the said written agreements, when and shortly after handing Bagash the unsigned agreements the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, made the following material representations:

22.1 the First to Sixth Defendants and Indawo Investments needed to present to the South African Reserve Bank ("the SARB") agreements in those terms signed by Bagash on behalf of the Plaintiff; and

22.2 if Bagash signed the agreements they would be used for that purpose alone and the agreements the Plaintiff had concluded in December 2005, namely annexures "A" and "B" hereto, would remain the real agreements.";

15. replacing paragraph 23 with the following paragraph:

"23. When making the representation referred to in paragraph 22.2 above, the Second Defendant and/or the Fourth Defendant, acting on their own behalf and on behalf of the First, Third, Fifth and Sixth Defendants, were aware that it was false and intended to induce Bagash to sign the two agreements on behalf of the Plaintiff to the detriment of the Plaintiff, and made such representation unlawfully and in breach of their duty not to mislead Bagash or the Plaintiff. More specifically:

23.1 as to such falsity and the knowledge of the Second Defendant and/or the Fourth Defendant thereof, they knew that if Bagash signed the two agreements on behalf of the Plaintiff the First to Sixth Defendants intended to take up the attitude that they were genuine agreements which, together, replaced the Plaintiff's agreement with the Eighth Defendant (annexure "B" hereto") with an agreement with the Heritage Investment Trust; and

23.2 as to the detriment to the Plaintiff, and the knowledge of the Second Defendant and/or the Fourth Defendant thereof, they knew that the terms of the agreement between the Plaintiff and the Heritage Investment Trust were less favourable to the Plaintiff than the terms of its agreement with the Eighth Defendant (annexure "B" hereto") in that, amongst other things:

23.2.1 the Plaintiff would become a shareholder of the Eighth Defendant, whereas previously it had been only a creditor of the Eighth Defendant;

23.2.2 the interest on the Plaintiff's loan to the Eighth Defendant would be reduced from 8% per annum to the US dollar base rate;

23.2.3 the said loan would be unsecured, whereas previously it had been secured by a cession of the shares of the company holding the property acquired with the loan;

23.2.4 the Plaintiff would lose its entitlement to the 3% loan raising fee; and

23.2.5 the Plaintiff would lose the 42 month outer limit on the period within which the Eighth Defendant had to pay the balance of its share of the profit of the development of the Umdhloti property.";

16. replacing paragraph 24 with the following paragraph:

"24. Relying on the truth of the representations referred to in paragraph 22 above, Bagash signed the said written agreements on behalf of the Plaintiff, whereupon the Fourth Defendant signed them on behalf of the Eighth Defendant (the first agreement) and the Heritage Investment Trust (the second agreement). Copies of the signed agreements are annexed hereto marked "C" and "D".";

17. replacing paragraph 25 with the following paragraph:

"25. Relying on the truth of the representations referred to in paragraphs 12(1) and/or 22 above and as a result of one or more or all of the representations, and/or as a result of the non-disclosures referred to in paragraphs 13(3) and 13(4) above, on 17 May 2006, Bagash, acting

on behalf of the Plaintiff, transferred to the bank account of the Eighth Defendant a further US 2 million of the US $10 million loan referred to in the written agreement with the Eighth Defendant (annexure “B” hereto).”;

18. replacing paragraph 26 with the following paragraph:

“26. The amount of US $3.5 million paid by the Plaintiff to the Seventh Defendant on 21 December 2005 was not used by the Seventh Defendant to buy out an outside group of investors who had put up the money used by the Seventh Defendant to acquire the Ilala Ridge property or to finance the purchase of the Ilala Ridge property.”;

19. replacing paragraph 27 with the following paragraph:

“27. The amount of US $7.5 million paid by the Plaintiff to the Eighth Defendant on 14 March 2006 was not used by the Eighth Defendant to finance the purchase of the Umdhloti property.”;

20. replacing paragraph 28 with the following paragraph:

“28. The amount of US $2 million paid by the Plaintiff to the Eighth Defendant on 17 May 2006 was not used by the Eighth Defendant to finance the purchase of the Umdloti property.”;

21. replacing paragraph 29 with the following paragraph:

“29. Unbeknown to Bagash and the Plaintiff, the First Defendant, the Second Defendant, the Third Defendant, the Fourth Defendant, the Fifth Defendant and/or the Sixth Defendant dishonestly caused the Seventh and Eighth Defendants to on-pay the loan amounts referred to in paragraphs 26 to 28 above, alternatively a substantial portion of the money, directly, or indirectly through other entities:

29.1 to the First Defendant

29.2 to various trusts and other entities associated with the Second and Third Defendants and/or members of their families;

29.3 to various trusts and other entities associated with the Fourth to Sixth Defendants and/or members of their families and/or Lourens; and/or

29.4 to various other companies owned or controlled by the Indawo Investment Trust.";

22. replacing paragraph 30 with the following paragraph:

"30. To date:

30.1 the Seventh Defendant has not undertaken any property development on the Ilala Ridge property;

30.2 the Eighth Defendant has not undertaken any property development on the Umdlothi property; and

30.3 neither of the Seventh Defendant or the Eighth Defendant has repaid the Plaintiff the loan amounts referred to in paragraphs 26 to 28 above, any interest on such amounts or any other amounts.";

23. replacing paragraph 31 with the following paragraph:

"31. In making the misrepresentations described in paragraphs 12(1) and/or 22 above, and/or as a result of the non-disclosures referred to in paragraphs 13(3) and 13(4) above, and in acting in the manner described in paragraph 29 above, the First to Sixth Defendants acted wrongfully and dishonestly and caused the Plaintiff to suffer the following harm:

31.1 the loss of the US $3.5 million it paid to the Seventh Defendant on 21 December 2005;

31.2 the loss of the US $7.5 million it paid to the Eighth Defendant on 14 March 2006, and

31.3 the loss of the US $2 million it paid to the Eighth Defendant on 17 May 2006.";

24. replacing paragraph 32 with the following paragraph:

"32. As a result of the First to Sixth Defendants' actions the Plaintiff has suffered damage of US $13 million.";

25. replacing paragraph 33 with the following paragraph:

"33. Pursuant to the settlement of this matter with the Sixth Defendant, he paid the Plaintiff R6 050 000 on or after 28 July 2011.";

26. replacing paragraph 34 with the following paragraph:

"34. Despite demand the First to Fifth Defendants have failed and/or refused to pay the Plaintiff any part of the US $13 million damage it has suffered.";

27. deleting paragraph 35;

28. replacing the prayer with the following prayer:

"WHEREFORE the Plaintiff prays for judgment against the First to Fifth Defendants, jointly and severally, the one paying the others to be absolved, for:

(a) payment of the sum of US $13 million, less the US Dollar equivalent of R6 050 000 on 28 July 2011;

(b) interest at the prescribed rate on US $3.5 million from 21 December 2005, alternatively 11 February 2009, further alternatively from the date of judgment until the date of payment;

(c) interest at the prescribed rate on US $7.5 million from 14 March 2006, alternatively 11 February 2009, further alternatively from the date of judgment until the date of payment;

(d) interest at the prescribed rate on US $2 million from 17 May 2006, alternatively 11 February 2009, further alternatively from the date of judgment, until the date of payment

(e) in the alternative to paragraph (d):

(i) interest at the prescribed rate on US $2 million from 17 May 2006, alternatively 11 February 2009, until 28 July 2011; plus

(ii) interest at the prescribed rate on US $2 million less the US Dollar equivalent of R6 050 000 on 28 July 2011, from 28 July 2011 until the date of payment;

(f) in the further alternative to paragraph (d), interest at the prescribed rate on US $2 million less the US Dollar equivalent of R6 050 000 on 28 July 2011, from the date of judgment until the date of payment;

(g) costs of suit, including the costs of two counsel; and

(h) further and/or alternative relief."

[7] On 19 February 2014 the defendants delivered a notice of objection to the plaintiff's proposed amendments anchored on the following four grounds: (a) the proposed amendments would require the defendants to plead once more to a materially and substantially different version of the plaintiff's case, (b) the proposed amendments constitute an abuse of the process envisaged by the Uniform Rules of this court, (c) the proposed amended claim is excipiable since it is vague and embarrassing, alternatively, it fails to disclose a cause of action, and (d) the proposed amended particulars of claim seek to

withdraw admissions made by the plaintiff in its existing particulars of claim without explanation.

[8] The remainder of the defendants has not objected to the proposed amendments. In its proposed amendments the plaintiff firstly seeks to withdraw its claim in the amount of US$52 262 565, secondly to reflect the reduction of the quantum of damages it claims from the remaining defendants by deducting the amount of R6 050 000 paid to the plaintiff by the sixth defendant in terms of the aforesaid settlement agreement and thirdly to amend the facts upon which its claim for US$13 million is based and the legal consequences flowing therefrom. The defendants' opposition to this application is limited to this third leg of the proposed amendments.

[9] During the course of argument counsel referred me to a number of authorities on the subject. What can be gleaned from those authorities is that our law relating to the amendment of pleadings is fully developed, and I therefore proceed to state what I conceive to be the legal principles distilled from such authorities which are applicable to this application. It seems to me that the following legal principles have crystallised and are trite:

(a) The party seeking an amendment bears the onus of showing that it is made *bona fide* and that there is an absence of prejudice to other party,

(b) The granting or refusal of an application for amendment of pleadings is a matter for the discretion of the court which discretion is to be exercised judicially in the light of all the facts and circumstances before it,

(c) The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the adversaries,

(d) The vital consideration in the decision whether to grant an amendment is whether the amendment will cause the other party such prejudice as cannot be cured by an order for costs and where appropriate, a postponement,

(e) The litigant seeking to make an amendment is in fact craving an indulgence and must offer some explanation as to why the amendment is required and more especially if the application for amendment is not timeously made, some reasonably satisfactory account of the delay,

(f) Where a proposed amendment will not contribute to the determination by the court of the real issues between the parties, it ought not to be granted,

(g) One of the grounds upon which a proposed amendment can successfully be opposed is that it would resuscitate a prescribed claim or defeat a statutory limitation as to time, and

(h) The mere fact that the amendment sought will result in the introduction of an additional new cause of action or to add a new claim is not *per se* a ground for refusing such amendment. It is to be cautioned that there is some authority that such amendment should not be allowed but no general rule to that effect has been laid down.

[10] The object of pleadings has been authoritatively laid down by Innes CJ in *Robinson v Randfontein Estates Gold Mining Co. Ltd* as follows:[2]

> 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent fully enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings.'

[11] And as was aptly stated by Galgut DJP in *Four Tower Investments (Pty) Ltd v Andre's Motors*:[3]

> 'The function of a court is, of course, to resolve disputes between litigating parties, and justice can only be done if the real issues are defined in the pleadings and ventilated in court. For this reason it is by now well established that an application for amendment will always be allowed unless it is made *mala fide* or would cause prejudice to the other party which cannot be

[2] 1925 AD 173 at 198.
[3] 2005 (3) SA 39 (N) para 15.

> compensated for by an order for costs or by some other suitable order such as a postponement.'

[12] Having briefly outlined the factual background and the applicable legal principles in *casu*, I advert to deal with the four grounds of objection so raised in sequence.

[13] The first ground of objection advanced by the defendants is that the plaintiff seeks to make such substantial changes to the existing particulars of claim that the heart of its claim changes entirely. Counsel for the defendants contended that the proposed amendments significantly and materially alter the factual and legal basis upon which the plaintiff pleads (a) its cause of action, (b) the quantum of damages the plaintiff alleges it suffered and (c) how the plaintiff suffered those damages.

[14] Counsel for the defendants contended further that the changes sought to be made go far beyond the correction of inadvertent errors or the tweaking of factual details. He submitted that the proposed amendments are on the scale of a complete revision of the factual basis for the plaintiff's claim. In his view, all that remains recognisable in the proposed amended particulars of claim is that the plaintiff's case continues to rely upon alleged misrepresentations ascribed to the defendants albeit vastly different to those foreshadowed in the existing particulars of claim which are alleged to have been made by different parties on different occasions and had allegedly induced the plaintiff to conclude different agreements.

[15] He submitted that the defendants will be prejudiced if the proposed amendments are allowed because the plaintiff will have had an unwarranted opportunity to restate its claim in its entirety, and the defendants would be required to plead once more to a materially and substantially different version of the plaintiff's case as the proposed amendments would bring about certain fundamental changes if they are allowed. He enumerated what he considered to be fundamental changes which the proposed amendment would allegedly bring.

[16] This contention is of course the very opposite of what counsel for the plaintiff contends in this matter. Counsel for the plaintiff submitted that the basis of the plaintiff's claim remains the same and is anchored on the misrepresentations by or on behalf of the first to sixth defendants. He continued and contended that the manner in which the plaintiff suffered the damages in question remain the same. He pointed out that the quantum of the claim will indeed change significantly taking into account that the plaintiff seeks to abandon its first existing claim and thereafter deducting amount of R6 050 000 from the remaining claim which amount was paid by the sixth defendant to the plaintiff in terms of the settlement agreement.

[17] I need to emphasise that clarity and precision are the allies of order in law whereas the impression and vagueness all two often are its enemies. It follows, therefore, that justice can only be done if the real issues are defined in the pleadings and ventilated in court.[4] The fact that the defendants have pleaded to the existing particulars of claim cannot be a bar to the proposed

[4] See *Four Tower Investments* supra para 15.

amendments. I have closely examined the nature and extent of the proposed amendments, compared them with the existing particulars of claim, and it seems to me that the essential grounds upon which the defendants are allegedly liable to the plaintiff remain constant throughout. As is the case in the existing particulars of claim, the plaintiff's claim on the proposed amendments is predicated on the facts that certain monies were advanced and lost in consequence of the material misrepresentations of the first to sixth defendants.

[18] In the circumstances I find it idle to contend that the defendants will be prejudiced by the proposed amendments in a manner which cannot be compensated by a suitable order as to costs. By its very nature an amendment may differ in certain respects from the case as already pleaded. In that event, it would be open to the defendants to amend their pleas should they so wish. Having reached this conclusion it seems to me that the issue of prescription does not arise.[5]

[19] The second ground of objection advanced by the defendants is that the proposed amendments constitute an abuse of the process envisaged by the Rules of this court. The gravamens of the defendants' complaints are that:

(a) In paragraphs 13 to 16 of the Rule 28 (1) notice, the plaintiff seeks to introduce fresh allegations of further misrepresentations it alleges the first to sixth defendants made

[5] See in this regard, *Rustenberg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA) paras 10 and 19.

in relation to two agreements entered into on 25 April 2006 and it also seeks to attach copies of agreements concluded on 25 April 2006 as “C” and “D” to the particulars of claim.

(b) In its existing particulars of claim, the plaintiff does not mention the two agreements of 25 April 2006 and it also does not mention the misrepresentations that allegedly induced it to enter into those agreements. Only after the first to sixth defendants alleged the existence of the agreements of 25 April 2006 in their pleas did the plaintiff see fit to allege the existence of the agreements and also to allege that the plaintiff concluded them because of misrepresentations allegedly made by the first to sixth defendants.

(c) The plaintiff seeks to remove all allegations, contained in paragraphs 11, 12(1), 14, 15, 16, 25, 26, 27, 28 and 30 of the plaintiff’s existing particulars of claim, about a joint venture alleged to have been concluded by the plaintiff and the first defendant. The existence of the joint venture forms an integral part of the plaintiff’s cause of action in its existing particulars of claim. In their pleas, the first, second and third defendants have denied the existence of any joint venture between the plaintiff and the first defendant, and the plaintiff, in response, now seeks to amend its particulars of claim to accord with such denial.

[20] Counsel for the defendants submitted that the proposed amendments are an attempt on the part of the plaintiff to tailor its case to deal with difficulties presented by facts pleaded by the defendants. He submitted further that Rule 28 is not designed to afford the plaintiff an opportunity to present a further, different version of events in response to counter-allegations made by the defendants in their pleas, nor does it permit the plaintiff, after the fact, to explain away aspects of the defendants' case that do not fit the plaintiffs' initial version of the events.

[21] He also submitted that the cause of action in respect of the bulk of the representations now pleaded for the very first time (in new paragraphs 12 and 22 of the proposed amendments) has prescribed. His contention is that the proposed amendments are not *bona fide* and will prejudice the defendants in a manner that cannot be remedied by a costs order or by a postponement. And would afford the plaintiff unwarranted opportunity to fashion its case to neutralise the defence pleaded and the fact that the defendants would be required to plead once more to a materially and substantially different version of the plaintiff's case.

[22] I indicated in paragraph 18 of this judgment that in light of my finding under the first ground of objection, the issue of prescription does not arise. In *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* Southwood AJA stated:[6]

[6] 2004 (6) SA 66 (SCA) para 50.

> '…The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof of *mala fides*. In order to prove *mala fides* a further inference that an improper result was intended is required.'

[23] It is common cause that this matter has not yet been allocated a trial date. I agree with counsel for the plaintiff that should the proposed amendment be granted, the defendants will have ample opportunity in which to consider the amendments made in the particulars of claim in their amended form. In those circumstances, the door will still be opened to the defendants to consider them and to plead on them, should they so wish. I have already indicated in para 5 above, that the evidence of the plaintiff on the proposed amendments was that they were conceived as a result of the review and reconsideration of the plaintiff's case by a new team of senior counsel which included an assessment of the matters raised in the defendants' pleas and taking into account written agreements which are annexures "C" and "D" as well.

[24] The third ground of objection advanced by the defendants is that the plaintiff's proposed amended claim is excipiable because it is vague and embarrassing, alternatively, it does not disclose a cause of action in that the plaintiff does not state the dates upon which unlawful conduct alleged to have been perpetrated by the first to sixth defendants which sustains the plaintiff's cause of action, occurred. This ground is predicated firstly on assertion that the plaintiff has not alleged in paragraph 21 of its notice of the proposed amendment the dates upon which the first to sixth defendants caused the seventh and eighth defendants to make payments to various entities specified

in that paragraph. And secondly, that in paragraph 3 of its notice of the proposed amendment, the plaintiff has not alleged when or how or in what format each of the misrepresentations alleged to have been made by the first to sixth defendants were made, save to state in paragraph 2 of its notice of the proposed amendment that the plaintiff was invited to lend money to the seventh and eighth defendants between about May 2005 and about January 2006 as well as to list in paragraph 4 thereof, a series of conversations, email messages and meetings that are alleged to have occurred.

[25] Counsel for the plaintiff submitted that in the proposed amended particulars of claim, the plaintiff does no more than ascribe a large and at times vague body of representations to the defendants without pleading which representations were attributable, to which defendant and on what occasion. He contended that such vagueness would make it impossible for the defendants to plead to the proposed particulars of claim. He took the view that the suggestion by the plaintiff in its heads of argument that the defendants are at liberty to request particulars for trial to cure any lack of specificity in the particulars of claim while mounting to a concession that the proposed amended particulars of claim do, in fact lack specificity, does not relieve the plaintiff of the obligation to plead in sufficient detail to enable the defendants to plead.

[26] Counsel for the plaintiff submitted that the plaintiff alleges in paragraph 2 of the proposed amendments that the events in question took place between May 2005 and about January 2006, that in paragraph 3 thereof it describes in detail the material misrepresentations in question and stated

further that the loans referred to in the first line of the proposed new paragraph 12 (1) of the proposed amendments set out in paragraph 3 of its notice are the two loans described in the proposed new paragraph 11 of proposed amendments. He submitted further that the plaintiff sets out further in paragraph 4 of its notice of the proposed amendments specific dates and time periods which are associated with the particular misrepresentations which are fully described therein.

[27] With regard to the assertion that the plaintiff has not alleged, in paragraph 21 of its notice of proposed amendments, the dates upon which the first to sixth defendants caused the seventh and eighth defendants to make payments to the various entities described there, counsel for the plaintiff contended that these payments took place without the knowledge of both Mr Bagash and the plaintiff. He then submitted that in any event, all of the defendants have full knowledge of the facts in question and are therefore quite easily able to say whether the payments alleged to have been made were in fact made, and when that took place.

[28] I cannot find that these criticisms are fully justified. I am mindful of the fact that a party cannot introduce an amendment which will render a pleading excipiable.[7] It, however, seems to me that the issues raised in the proposed amendments are such that they ought to be ventilated and decided between the parties in the course of the trial of this action.

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[7] See *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) at 641A-B.

[29] In the result I am driven to conclude that the dates and/or the period within which the said misrepresentations are alleged to have arisen are easily ascertainable from the proposed amendments to enable the defendants to plead thereto. The same can also be said about the types, nature and/or extent of the alleged misrepresentations. I am not persuaded that the facts set out in the proposed amendments sustain the conclusion reached by the defendants on this issue.

[30] The final ground of objection advanced by the defendants is that the plaintiff's proposed amended particulars of claim contain the withdrawal of admissions made in the plaintiff's existing particulars of claim. The foundation of this contention is that in paragraph 21 of the plaintiff's existing particulars of claim the plaintiff asserted that it had duly performed its obligations in terms of the agreements which form annexures "A" and "B" to its existing particulars of claim by paying US $13 million to the seventh and eighth defendants. Counsel for the defendants was of the view that this constituted an admission which the plaintiff seeks to withdraw without providing an explanation justifying its withdrawal. He contended that the defendants would be prejudiced by such withdrawal.

[31] Allied to that contention was that even if such is found not technically to be an admission in the strict sense of the word the payment in question, pleaded, as it is, as having been pleaded in the plaintiff's existing particulars of claim as having being made under a joint venture is so fundamentally at odds with the version the plaintiff now seeks to advance in the proposed

amended particulars of claim that, it requires an explanation to justify its withdrawal which explanation the plaintiff has failed to give. I have carefully considered the contents of paragraph 21 of the existing particulars of claim and I am not persuaded that what is contained therein amounts to the kind of admission envisaged in s 15 of the Civil Proceedings Evidence Act 25 of 1965. I do not believe therefore that this point can in anyway avail the defendants. I must accordingly hold against the defendants on this argument.

[32] Overall, in all the circumstances of this case I am not persuaded that the application to amend was made *mala fide* or that the amendment would cause an injustice to the defendants who cannot be compensated by an appropriate order for costs.

[33] There remain two further issues which I must deal with. The first issue relates to the application for condonation for the failure of the plaintiff to bring this application within the period as required in the Rule 28 (4) of the Uniform Rules of this court. It is common cause that the plaintiff failed to lodge this application within 10 days of delivery of the defendants' objection to its proposed amendments as is required by Rule 28 (4). The papers demonstrate that the plaintiff's notice of the proposed amendments was delivered to the defendants on 5 February 2014. The defendants' objections to the proposed amendments were served on 19 February 2014. In response to the defendants' objections to the proposed amendments, the plaintiff delivered its application for leave to amend only on 28 May 2014.

[34] In dealing with the application of this nature, the following factors are apposite (a) an application for an extension of time or condonation must furnish an explanation for the default that is sufficiently full to enable the court to understand how it really came about and to assess the applicant's conduct and motives,[8] (b) the explanation for the delay must be reasonable,[9] (c) the grant of the extension or condonation must not prejudice the other party in any way that cannot be compensated for by a suitable order as to the postponement and costs,[10] and (d) there must be a reasonable possibility of the applicant succeeding if the extension or condonation is granted.[11]

[35] With regard to this aspect the plaintiff has placed the following facts before the court:

(a) The new counsel with whom Mr Bagash consulted in Mumbai in November 2013 is Mr *Breitenbach* of the Cape Bar. Mr Jazbhay of the plaintiff's attorneys first consulted with Mr *Breitenbach* in January 2013. After Mr *Breitenbach* had read his way into the matter, Mr Jazbhay organised a consultation between counsel and the plaintiff. This proved difficult because, amongst other things, it involved international travel. The consultation was eventually held on 8 and 9 November 2013.

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[8] *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) para 17.
[9] *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 22.
[10] *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) 572D, *Abraham v City of Cape Town* 1995 (2) SA 319 (C) at 322A-D.
[11] *Pienaar v G North & Son (Pty) Ltd* 1979 (4) SA 522 (O) at 523-524.

(b) After Mr *Breitenbach* had returned to South Africa, Mr *Newdigate* SC, also of the Cape Bar, was briefed in this matter together with Mr Breitenbach. Initially Mr *Gauntlett* SC was appointed, but Mr *Newdigate* was then appointed in his stead. Mr *Newdigate* read his way into the matter and settled the notice of intention to amend expeditiously.

(c) Mr *Breitenbach* acted as a Judge of the Cape High Court from 1 to 28 March 2014, and was therefore unable to attend to the settling of the papers in this application. Because of the involvement of Mr *Breitenbach* in the matter, it was regarded by the plaintiff, as well as the plaintiff's attorneys, as important that Mr *Breitenbach* should also have the opportunity to settle the papers in this application.

(d) These circumstances were drawn to the attention of the first to third defendants' attorneys by means of a letter dated 11 March 2014 (incorrectly dated 20 April 2014) the date on which Mr *Breitenbach's* acting appointment would end. The defendants' attorneys responded by means of a letter dated 14 March 2014, refusing an extension and giving no reasons for the refusal.

[36] Counsel for the plaintiff submitted that the explanation in para 35 above is both full and reasonable and that no conceivable prejudice will be suffered by the defendants were such relief to be granted and that the plaintiff has

prospects of success in its action against the defendants as set out in the proposed amendment.

[37] Counsel for the defendants pointed out that in spite of the fact that the draft memorandum for a special allocation circulated by the plaintiff's attorneys on 18 November 2013 indicated that *Gauntlett* and *Breitenbach* had advised the plaintiff in respect of an amendment of its particulars of claim, it appears that Mr *Newdigate* was subsequently appointed in the stead of Mr *Gauntlett*. Secondly, that Mr *Newdigate* appears to have been available to settle the application for leave to amend within the prescribed time, and Mr *Breitenbach* acted on the bench only from 1 March 2014 until 28 March 2014. He submitted that in the circumstances, the plaintiff has failed to provide reasonable grounds for an extension of the time period for the filing of this application until 28 May 2014. He contended further that the plaintiff has failed to show grounds to justify condonation for the late filing of this application, as he believed that the plaintiff has less than reasonable prospects of success in this application for leave to amend.

[38] I have already set out the factors which the court needs to take into account in the exercise of its discretionary power to condone any non-compliance with the Rules of this court on good cause shown. Having considered these factors in light of the explanation given by the plaintiff I am satisfied that the plaintiff's failure to bring this application within the period specified in Rule 28 (4) ought to be condoned.

[39] The second issue which needs consideration is that of costs. Counsel for the plaintiff submitted that the defendants have, without valid grounds, objected to the plaintiff's proposed amendments, and have put the plaintiff to the trouble and expenses of bringing this application. In the circumstances, he submitted, it would be just and equitable that the defendants should be ordered to pay the plaintiff's costs of the application. I pause to state that the plaintiff engaged two senior counsel to argue this application, and the reasons advanced for that were the factual complexity and the large sum of money involved in the matter.

[40] On the contrary, counsel for the defendants submitted that the objections raised are substantial and demonstrably neither spurious nor raised *mala fide* for purposes of delaying the hearing of this action and adjudication of this claim.

[41] I do not agree that the matter merited the employment of two senior counsel by the plaintiff. With regard to the issue of costs, the general rule is that in the ordinary course, costs follow the result but this rule is subject to a number of exceptions that entitle the court in the exercise of its discretion to limit or disallow in part the costs to be recovered. I find that the plaintiff was justified in seeking these amendments. In the circumstances I find it appropriate to order the plaintiff to pay the costs of the application up to and including the filing and service of the plaintiff's replying affidavit, and to direct the first to third defendants to pay costs of argument of this application jointly and severally, the one paying and the other to be absolved.

[42] In the result the following order shall issue:

Order

(a) The failure of the plaintiff to bring this application within the period specified in Rule 28 (4) of the Uniform Rules of this court is hereby condoned.

(b) The plaintiff is hereby granted leave to amend its particulars of claim in the respects set out in the plaintiff's notice in terms of Rule 28(1), a copy whereof is annexed to the plaintiff's founding affidavit herein marked "A".

(c) The plaintiff is ordered to pay the costs of the application up to and including the filing and service of its replying affidavit.

(d) The first to third defendants are ordered to pay the costs of argument of this application jointly and severally, the one paying and the other to be absolved.

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MNGUNI J

APPEARANCES:

Date of Hearing	:	29 April 2015
Date of Judgment	:	12 August 2015
Counsel for the Applicant	:	Adv. J. A. Newdigate SC and Adv. A. M. Breitenbach SC
Instructed by	:	Omar and Jazbhay Attorneys
Counsel for the Respondents	:	Adv. J. J. Meiring
Instructed by	:	Abba Parak Incorporated