

SOUTH AFRICA / JUDGMENT

Covec SA (Pty) Ltd v Afri-Devo (Pty) Ltd (34554/2018) [2024] ZAGPPHC 664 (10 July 2024) [2024] ZAGPPHC 664

COURT

North Gauteng High Court, Pretoria

BEFORE

Potterill

CASE / FILE NUMBER

34554/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

Number: 34554/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

2024-07-10

SIGNATURE:

In

the matter between:

COVEC

SA (PTY) LTD

Applicant/Plaintiff

(Registration

number: 1993/00368/07)

And

AFRI-DEVO

(PTY) LTD

Respondent/Defendant

(Registration

number: 2004/009956/07)

This

judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the

Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing

down is deemed to be 10 July 2024.

JUDGMENT

POTTERILL J

Introduction

- [1] This matter was case-managed and a trial date was secured for between 3- 4 days. The matter was on trial for 4 days wherein the plaintiff called Messrs Langley and Chen. They were cross-examined and re-examined. Mr. Venter testified, was cross-examined and still has to be re-examined, if counsel so wishes. The matter then, contrary to the undertaking to the DJP, was not finalized in 4 days, became part-heard and postponed from November 2023 to 10 June 2024 to finalize the matter.
- [2] However, an application to amend the plaintiff's replication was filed prior to the further hearing date of 10 June 2024. The proposed amendment was objected to and this is the issue for decision before me. The plaintiff's counsel placed on record that Mr Venter was the last witness for the plaintiff and the proposed amendment would not result in any witness to be recalled.
- [3] The plaintiff also applied for an amendment of the particulars of claim substituting the incorrect NEC3 Engineering and Construction sub-contract with the correct version thereof. The defendant did not object to this amendment and the amendment is accordingly effected when the amended pages are delivered.
- [4] I refer to the plaintiff as Covec and the defendant as Afri-Devo.

The pleadings

- [5] To get a complete picture of the pleadings I find it prudent to set out the relevant portions of the particulars of claim, the amended plea, the replication before amendment, and the replication as sought through the amendment.

The essence of the particulars of claim

- [6] In the particulars of claim Covec pleaded that on 29 April 2024 Afri-Devo and Eskom concluded a principal agreement in terms whereof Afri-Devo would supply, deliver and install an advanced LifePO4 battery system [the BESS] for the Eskom Energy Storage Test and Demonstration Facility. The agreed price would be payable 50% payment upon delivery of the equipment at the job site and 50% payment upon successful completion of the pre-commissioning testing and demonstrated readiness for commercial operation. Mr Peter Langley, an employee of Eskom, was appointed as service manager for the purpose of inter-alia assessing the works and certifying payments.

- [7] On 17 June 2014 Covec and Afri-Devo concluded a written sub-contract agreement whereby Covec would supply, deliver, install and maintain the BESS to Eskom. In terms of the subcontract the assessment interval was recorded as being two weeks after delivery to the job site and two weeks after successful completion of the pre-commissioning testing and demonstrated readiness for commercial

operation. Furthermore, the period within which payments were to be made was recorded as being four weeks after the assessment period elapsed. The payment was recorded as 50% on delivery and 50% on successful completion of the pre-commissioning testing and

demonstrated readiness for commercial operation.

- [8] The NEC3 Engineering and Construction Subcontract provided that the contractor assessed the amount due at each assessment date. The first assessment date is decided by the contractor to suit the procedures of the parties and is not later than the assessment interval after the subcontract starting date. Later assessment dates occur at the end of each assessment interval until four weeks after the contractor issued the defects certificate and at completion of the whole of the subcontract works. The amount due is the price for work done to date, plus other amounts to be paid to the subcontractor less amounts to be paid by or retained from the subcontractor. The contractor gives the subcontractor details of how the amount due has been assessed.

- [9] The contractor certifies a payment within two weeks of each assessment date. The first payment is the amount due. Other payments

are the change in the amount due since the last payment certificate. A payment is made by the subcontractor to the contractor if the change reduces the amount due. Each certified payment is made within four weeks of the assessment date or, if a different period as stated in the subcontract data, within the period stated. If a certified payment is late, or if a payment is late because the contractor does not issue a certificate which he should issue, interest is paid on the late payment.

[10] Subsequent to the conclusion of the written contract, Covec performed its duties in accordance with the contract. In particular, Covec procured and subsequently supplied, delivered and installed the works and subsequent to the installation as aforesaid. Eskom paid 50% of the agreed price in accordance with the principal agreement and in turn on 25 February 2015, Afri-Devo paid the amount of R9,354,059.31 to Covec in terms of the subcontract.

[11] Covec attended to the pre-commissioning and the demonstration of readiness for commercial operation. On 14 May 2015, the project

manager tested the works and accepted the works for the purpose of pre-commissioning testing and readiness for commercial operation. A copy of the acceptance test, incorporating the acceptance of the works was attached as Annexure CO4. Eskom then paid Afri-Devo the balance of 50%. However, Afri-Devo did not pay this remainder of the agreed price over to Covec. Afri-Devo was obliged to issue the payment certificate by no later than 28 May 2015 and to pay the amount reflected in the payment certificate by no later than 11 June 2015 and which payment certificate ought to have reflected the amount of R7,416,059.29 (including VAT), being the agreed price of R16, 770,118,80 less the first payment paid, being R9,354,059,31.

[12] Covec seeks two declaratory orders: that the assessment test dated 14 May 2015 confirms that the pre-commissioning had been successfully completed and that the works had demonstrated its readiness for commercial operation; that Afri-Devo was to issue the payment certificate and to pay the balance of the purchase price by no later than 11 June 2015. Covec also seeks payment of the amount of R7,416,059.29 alternatively the amount of R7,11,157.33 together with interest.

Afri-Devo's Plea

[13] In Afri-Devo's plea it was specifically denied that Covec executed the works as is provided for in the sub-contract. It pleaded that Covec's performance in terms of the sub-contract constituted obligations that were reciprocal in nature and because Covec failed to perform Afri-Devo is excused from performance in terms of the sub-contract.

[14] It was pleaded that in terms of the sub-contract Covec had to complete the works by the 14th of January 2017 and was obliged to deliver the BESS on the 31st of October 2014. Covec was obliged to successfully complete the pre-commissioning testing and demonstrate readiness for commercial operation by the 17th of November 2014. It was obliged to maintain the BESS until the 14th of January 2017 and to submit revised programmes at intervals of no longer

than 4 weeks. Covec was obliged to, during the first three years, conduct testing and regular maintenance, where necessary and was also obliged to carry out tests for a full 90-day period as provided for in the scope of works. It was obliged to, upon the finalisation of the 3-year maintenance period, dismantle and dispose of the BESS. Covec was obliged to have personnel available on a notice period of 48 hours during the aforesaid 90-day test period and during the 3-years maintenance and defect period to ensure that the BESS is maintained and any failure or defect without delays. It was obliged to deliver a BESS that shall perform at a minimum performance level of 95% during the 3-year maintenance and defects period. Covec was obliged to train at least two Eskom personnel regarding the installation commissioning, maintenance and operation of the BESS. The Plaintiff had to comply and implement a quality management system.

- [15] In amplification of the aforesaid lack of performance, it pleaded that the BESS was only delivered on the 6th of March 2015. Covec was obliged to supply, deliver, install and maintain the battery in terms of the sub-contract, and more specifically the scope of works. Accordingly, it was specifically denied that Covec demonstrated readiness for commercial operation.
- [16] It was specifically denied that the site acceptance test that was conducted on the 14th of May 2015, could have demonstrated readiness for commercial operation. Readiness for commercial operation could only be achieved if Covec executed the scope of works, which it did not. Afri-Devo was not obliged to issue any payment certificate or make any further payment towards Covec in the absence of it executing the works in terms of the sub-contract.

The replication

- [17] Covec admitted the contents of the correspondence dated 8 May 2017. It denied that the commercial readiness of the battery system was not extended to 31 December 2018. It replied that the service/maintenance period (or warranty period) envisaged by the contract concluded between Eskom and the Afri-Devo was extended to 31 December 2018. The key dates in terms of the contract was that on 31 October 2014 the battery system was to be delivered. On 17 November 2014 the battery system would be successfully completed and the pre-commissioning testing and demonstrated readiness for commercial operation with the maintenance period to end on 14 January 2017.
- [18] For the reasons pleaded in the plea to the counterclaim [the counterclaim had however been abandoned], the battery system was only delivered during February 2015 and on 14 May 2015 the project manager tested the works and accepted the works for the purpose of pre-commissioning testing and readiness for commercial operation. A copy of the acceptance test incorporating (the "SAT") is attached to the plaintiff's particulars of claim. The service/maintenance period (or warranty period) envisaged by the

contract concluded between the parties was extended accordingly.

[19] Covec replied that it fulfilled its obligations in terms of the subcontract and in particularly it remedied the defects and it provided acceptable spare holding, acceptable maintenance schedule and information relating to the fire suppressant. When issuing the SAT the following defects were recorded:

“the air conditioning installation was properly done on the 20 ft container;

the outlet of the main air conditioner for the 40 ft container needed to be addressed, including the piping and door plate;

the door to the inverter had to be fixed so it was easy to open and close;

steps had to be made safe through the erection of handrails;

the concrete feet under the 20 ft container had to be fixed; and

the metal spacer plates were rusting and had to be remedied.”

[20] The defects recorded in the SAT was subsequently remedied by Covec and/or Afri-Devo. Whilst there was a disagreement as to who was responsible for the payment of the remedying of the defects, ultimately Covec and Afri-Devo agreed that the amount of R257,808.74

(ex VAT) would be deducted from the amount due by Afri-Devo to the Covec, which amount was calculated in the sum of R7,122,157.33.

Proposed amendment to replication

The main amendments are discussed below.

[21] The striking out of the last two sentences of par 2.6 and a new paragraph 2.7 that reads as follows:

“On 6 January 2015, a representative of the plaintiff’s shareholder, being Mr Nicholas Shen, notified the defendant in writing that the BESS was expected to arrive at Port Durban on 22 February 2015 whereafter the BESS would clear customs and be transported to the job site. A copy [sic] Shen’s email evidencing the aforesaid is attached hereto as PLP3.” A new par 2.8 is added that reads that the BESS was delivered on 6 March 2015.

[22] A new paragraph 5.3 is added:

“The plaintiff denies that the defendant is excluded from performance because the plaintiff failed to perform its obligations. In amplification of the aforesaid denial, the plaintiff pleads hereinbelow.

5.4 The subcontract Data (as amended) provided for the conditions to be met, namely:

5.4.1 delivery on site;

5.4.2 successful completion of pre-commissioning testing and demonstrated readiness for commercial operation;”

“5.4.3 maintenance(three years after commissioning.)

5.5 The conditions referred to in the preceding paragraph were met on the following dates:

5.5.1 delivery of the BESS took place on 6 March 2015;

5.5.2 the successful completion of the pre-commissioning testing and demonstrated readiness for commercial operation took place on 14 May 2015; and

5.5.3 the maintenance period came to an end on 22 March 2019.”

[23] Paragraph 5.6 sets out clauses 50.1 and 51 of the NEC Engineering and Construction Subcontract read with the subcontract Data setting out how and when assessment must take place. In terms of those clauses:

“5.7 The defendant had the obligation to:

5.7.1 In respect of the delivery of the BESS to the job site, to assess the amount due by no later than 20 March 2015 and to pay 50% of the purchase consideration, being R7,355,315,18 (excluding VAT) by no later than 5 April 2015; and

5.7.2 upon the successful completion of the pre-commissioning testing and demonstrated readiness for commercial operation, to assess the amount due by no later than 29 May 2015 and to pay 50% of the purchase consideration, being R7,355,315.18 (Excluding VAT) by no later than 12 June 2015.

5.8. Notwithstanding the late delivery of the BESS:

5.8.1 the defendant was fully aware that the BESS would not be delivered on the key date, being 10 February 2015;

5.8.2 upon the delivery of the BESS the defendant proceeded to assess the amount due and the defendant paid the amount of R9,354,059.31 to the plaintiff. The aforesaid amount constitutes 50% of the purchase consideration as agreed between the defendant and Eskom;

5.8.3 upon receipt of the aforesaid amount, the plaintiff proceeded to pay the amount of R849,999.00 to the defendant; and

5.8.4 upon delivery of the BESS, the defendant did not issue a certified payment and neither did the defendant thereafter issue a (Corrected) later certificate as envisaged by clause 51.3 nor did the defendant dispute the plaintiff's right to payment upon the late delivery of the BESS to the job site.

5.9 The defendant accordingly waived its right to raise the late delivery of the BESS alternatively the defendant undertook not to take any legal steps as a result of the late delivery of the BESS further alternatively the defendant is contractually precluded from raising the late delivery of the BESS, the late pre-commissioning testing and demonstrated readiness for commercial operation and for the extension of the maintenance period.”

[24] In paragraphs 5.10 and 5.11 it is replied that the defendant did not assess any additional cost, if any, and therefore did not incur additional costs due to the extent that the plaintiff did not meet the conditions for the key dates.

[25] In 5.12 it is pleaded that the defendant is precluded from relying on:

“5.12.1 the principle of reciprocity; and

5.12.2 the plaintiff’s alleged failure to perform its obligations as alleged by the defendant, including the obligations provided for in the scope of works.”

[26] In the new paragraphs 6.2, 6.3 and 6.4 it is replied that the defendant is precluded from asserting that the plaintiff is not

entitled to payment because of the lack of performance. This is so because the plaintiff’s only contractual right, when the

plaintiff did not meet the condition for the key dates, was to assess any additional costs incurred by not meeting the conditions and it did not do so.

[27] The new paragraph 6.5 reads as follows:

“In any event, the late testing of the BESS was caused by:

6.5.1 the defendant’s failure to properly construct the elevation points on the concrete piers on which the containers were to be installed and to fabricate and install the steel steps and balustrades; and

6.5.2 the inability of BYD and Eskom’s third party IT contractor to connect the respective parties communication link between the BESS and Eskom’s control room.”

The balance of the subparagraphs of paragraph 6 sets out that the plaintiff had no obligation to attend to technical issues of the product.

General principles of amendment

[28] This application is brought in terms of Rule 28(10). The rule states the following:

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

A Court hearing an application to permit an amendment has a wide judicial discretion.[1] When exercising this discretion whether to permit an amendment, the court is required to follow the well-established approach set out in *Moolman v Estate Moolman*[2]: “[The] practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes

of justice in the same position as they were when the pleading which is sought to amend was filed.”

[29] This approach of the Moolman matter has stood the test of time and was endorsed in later decisions where it was held that an amendment would not be allowed in circumstances which would cause the other party such prejudice as could not be cured by an order of costs. The main consideration of a court when exercising its discretion for an amendment thus centres around considerations of prejudice or injustice to the opponent.

[30] However, a litigant seeking to make an amendment at a late stage does so not as a matter of right, but is seeking an indulgence from the court.[3] The question of delay does not go to the time when it is brought, but in relation to the question of prejudice to show that the application to amend is bona fide and to explain the delay that there might have been in this regard.[4]

[31] Notwithstanding the above principles, in *Randa v Radopile Projects CC*[5] at paragraph [4] :

“[4] It has long been my conviction that the commencement of a trial is the fulcrum upon which the courts’ stance in respect of applications for amendments to pleadings should be balanced. The further away the parties are from the commencement of the trial, the easier it should be for a litigant to obtain an amendment and, conversely, the deeper the parties are into trial and the nearer they may be to obtaining judgment, the more difficult it ought to be.”

The reasons for the application to amend

[32] In the founding affidavit Mr Venter, the witness so to speak still “in the box”, states that the amendment is necessary

because there was “confusion” as to the programme attached to Mr Langley’s expert report. In his evidence Mr

Langley denied any knowledge of this attachment to his expert report and testified that it was not a contract between Eskom and Covec or Afri-Devo and was some project management tool of which he was unaware. This programme however related to another project and was incorrectly placed in the file relevant to this BESS. PLP3 attached to the replication is the communication relevant to this BESS and is sought to be attached to the amended replication. This communication sets out that the BESS would be delivered on 22 February 2015.

[33] He denies that new issues are raised and states that all the amendments are either common cause or was not cross-examined on. He submits that the amendment is only aimed at the defences raised by the defendant and is not at all directed at Covec’s claim; Covec’s claim stays the same.

[34] He submits that the amendment would allow for a proper ventilation of the disputes, would be in the interest of justice and would not delay the matter any further.

Opposition to amendment

- [35] In opposition to this the deponent for Afri-Devo sets out that the case for Covec has always been that it complied with its obligations in terms of the sub-contract to procure, supply, deliver and install the goods and attend to the pre-commissioning and demonstration of readiness for commercial operation. To this Afri-Devo specifically denied that Covec executed the works as provided for in the sub-contract. It then set out the duties Covec had in terms of the sub-contract. It specifically pleaded that the BESS was only delivered on 6 March. It specifically denied that Covec demonstrated readiness for commercial operation and as Covec did not comply with its duties the reciprocal nature of the contract releases Afri-Devo from making payment.
- [36] It is further stated that Covec did not rely on an addendum to its contract in the particulars of claim or replication, but now wants to introduce same.
- [37] Covec now wants to introduce an email to its amended replication that this email constituted “notification” that the battery system was delivered on 6 March 2015. This contradicts the particulars of claim wherein Covec set out that the delivery date was 31 October 2014.
- [38] The amendment also seeks to introduce three dates that Covec avers it complied with in terms of the sub-contract. The dates of 6 March 2015, 14 May 2015 and 22 March 2019 differ materially from the dates of performance in the particulars of claim.
- [39] Furthermore, Covec now wants to rely on obligations that Afri-Devo did not comply with, which was not relied on in the particulars of claim. Afri-Devo had the duty to assess the 50% purchase payment and had to do so before 29 May 2015 and make final payment on 12 June 2015.
- [40] It is submitted that all the above proposed amendments render the replication excipiable and should be disallowed.
- [41] Furthermore the amendment wants to introduce that because of the communication Afri-Devo was “fully aware” that the BESS would be delivered late, but does not aver that the parties agreed thereto.
- [42] Completely new to the pleadings, in the amendment waiver is raised; Afri-Devo waived its right to rely on late delivery of the BESS. Afri-Devo submitted not only is waiver not pleaded in accordance with the correct principles which would render the replication excipiable, but no evidence was led on waiver which will result in the matter having to be postponed and witnesses recalled. It also renders the replication excipiable.
- [43] It also introduces as alternative that Afri-Devo; undertook not to take any legal steps. There is no such defence in law and the non-variation clause in the sub-contract would render such “defence” useless. It would render the pleading excipiable.

- [44] For the first time the proposed amendment raises in the alternative that Afri-Devo is “contractually excluded” from raising the late delivery of the BESS. No evidence was led on this and no reference to the specific clause is made. It would render the replication excipiable.
- [45] There is a new averment that Afri-Devo had an obligation to assess the amounts and did not do so. The purpose of this new averment is not understood because Afri-Devo has no counterclaim.
- [46] The proposed amendment also raises for the first time that Covec was not liable for any problem that arose out of technical difficulties. This was not testified to by any witness and is not borne out by the sub-contract.
- [47] It is submitted that no reasons were set out as to why at this late stage the amendment is sought. The postponement sought in court were for completely different reasons; “fraud, deceit, misrepresentation and estoppel.”
- [48] If the amendment is allowed Afri-Devo will not be placed in the original position it was before the amendment and the prejudice

cannot be compensated with a costs order. It will be prejudiced if the matter after six years has to be postponed and witnesses recalled.

Decision on the application to amend

- [49] The amendment is substantial in nature and brought at a late stage in the court proceedings; during the trial just before close of Covec’s case. So not only is it late in the proceedings but, the lateness will be assessed in relation to the prejudice; the later the application is made the more likely it is that there will be prejudice to the other party.
- [50] The reason forwarded for the application is to bring the replication in line with the defences. The problem with this assertion is that nothing in Afri-Devo’s defence as pleaded has changed. The cross-examination was totally in line with the plea; this did not and could not require an amendment to the replication. The simple fact is that Covec seeks to introduce a new agreed date for the delivery of the BESS contrary to what is set out in the particulars of claim. Covec was since Afri-Devo’s plea aware that Afri-Devo relied on the late delivery of the Bess, the date of 6 March being specified, as non-compliance with the sub-contract. If the amendment is granted then the particulars of claim and the replication will be at odds pertaining to not only the date, but also Covec complying with its obligations in terms of the subcontract. And, also in conflict with the contract in which the dates were specified. Cross-examination was directly in line with the plea. This renders the amendment sought being excepted to.

[51] What is worse the amendment seeks to introduce an email as proof of this extended date of delivery. An amendment and an attachment to a replication is not the process to introduce evidence; evidence that was not discovered prior to trial and on which no evidence was led. It is astounding that counsel for Covec can place on record that if this amendment is allowed no recall of witnesses would be necessary. This correspondence was not canvassed with Mr Langley or Mr Chen and was not cross-examined on. The only way to introduce it would be to recall the writer of the e-mail and allow cross-examination thereon.

[52] But, even more astonishing is that this communication does not reflect the date of 6 March, but the date of 22 February. This

communication simply does not support the date of 6 March which the amendment seeks. If it is to be submitted, but from the port to the site would take a few days, then evidence would have to be led thereon and witnesses would need to be recalled.

[53] With no addendum to the contract pleaded initially, amending any of the stipulated dates, any evidence led to amend the contract relied upon would be hit by the Shifren clause. In the proposed amendment further reliance is placed on a written addendum to the sub-contract wherein the date of delivery of the Bess was amended to 10 February

2015. This is of no help to the amendment sought of 6 March.

[54] The amendment also seeks to introduce that Afri-Devo was fully aware that the BESS would be delivered late. It would seem that this averment excuses Covec from non-performance in terms of the contract. Knowledge of the other party of non-performance is not a legal excuse for non-performance, unless agreed to in writing, and this is not pleaded. This amendment sought is simply bad in law.

[55] The amendment now for the first time seeks to introduce waiver. Although the pleading does not expressly set out reliance on express or implied waiver, it was orally submitted that Covec would be relying on implied waiver. This should have been pleaded in the proposed amendment. Secondly, Covec has the onus to prove waiver. Not a single witness gave any evidence pointing to implied waiver by Afri-Devo. The witnesses would by necessity have to be recalled. This a completely new issue raised at a very late stage in the proceedings.

[56] The proposed amendment for the first time seeks to negate the principle of reciprocity on the basis that Afri-Devo undertook not to take legal steps as a result of the late delivery of the BESS. If it was done orally then there was no such evidence presented; if it was done in writing then no such evidence was presented. But, more importantly, this is not a recognised legal defence to avert reciprocity. Does this proposed replication imply that they were not entitled to defend this matter? This amendment sought would led to the pleading being excipiable.

[57] The amendment also seeks to introduce that Afri-Devo was contractually precluded from raising the late delivery of the BESS.

This is a completely new reply, while from the outset Afri-Devo had pleaded that the delivery was late. It could have been pleaded from the outset. However, what clause is relied upon is not pleaded and no evidence was led that Afri-Devo could not rely on the late delivery of the BESS.

[58] The amendment then for the first time seeks to introduce that Afri-Devo did not comply with the terms of the contract by not

assessing in terms of the contract. This new issue cannot be raised midway in the trial. Just as it cannot now for the first time raise that Covec could not be held responsible for any technical

issues.

[59] The new issues raised are severely prejudicial to Afri-Devo at a very late stage. Not only in nature, but also in relation to where in the proceedings the amendment is sought, the prejudice suffered cannot be compensated with a cost order. The other amendments sought will all lead to the amended pleading being excipiable. The amendments are either in conflict with the particulars of claim, or the contract on which they rely. Most of the amendments sought where in their knowledge prior to the commencement of the trial. If the evidence surprised them, they cannot “fix” it with this amendment because the cross-examination was in line with Afri-Devo’s plea and none of the evidence in chief support the amendments sought. The amendment will trigger a number of impermissible procedures including exceptions, allowing evidence to be entered into trial without discovery and new causes of action to be raised halfway through a trial. Most of the amendment will necessitate a postponement, amendment of the plea, with foreseeably amendment to the replication again. Witnesses will have to be recalled. This matter has taken 6 years to get to trial and it would not be in the interests of justice to allow such a postponement as the prejudice suffered will be too

great. The refused postponement for amendment did not necessitate this amendment as that was sought on the basis of “estoppel,

misrepresentation, deceit and fraud”, nothing of which is now sought in this amendment.

[60] I accordingly make the following order

The application to amend the replication is refused with costs.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 34554/2018 HEARD ON: 12 June 2024 FOR THE APPLICANT/PLAINTIFF: ADV. A.N.
KRUGER INSTRUCTED BY: Snyman De Jager Inc. FOR THE RESPONDENT/DEFENDANT: ADV. J.A.
VENTER INSTRUCTED BY: Des Naidoo & Associates DATE OF JUDGMENT: 10 July 2024

[1] Embling and Another v Two Oceans Aquarium CC 2000

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- (3) SA 691 (C) at 694G-H
- [2] 1927 CPD 27 at 29
- [3] Minister van die Suid-Afrikaanse Polisie en 'n Ander v Kraatz en 'n Ander 1973
- (3) SA 490 (A) 512E-H; Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978
- (1) SA 914 (A) 928D
- [4] Bankorp Limited v Anderson-Morshead 1997
- (1) SA 251 (W) 253E-F
- [5] 2012 (6) SA 128 (GSJ)
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Prepared on 9 October 2026 · Esheria