

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES/ NO
DATE: 30 OCTOBER 2023 JUDGE: T THUPAATLASE AJ

CASE NO. 18195/2022

In the matter between:

C[...]M[...]

APPLICANT/DEFENDANT

And

N[...] M[...]

RESPONDENT/PLAINTIFF

JUDGMENT

Thupaatlase AJ

Introduction

[1] This is an opposed application to amend in terms of Rule 28 (4) of the Uniform Rules of Court¹. For the sake of convenience parties will henceforth be referred to as in the action proceedings. The defendant seeks relief as fully set out herein below:

To delete paragraph 3.5 of the counterclaim and replacing it with the following:

'1. The Plaintiff has been involved in extra-marital affair(s) for the duration of the marriage'.

2. by inserting paragraph 4.4-4.19 as follows:

'4.4 During the course of the marriage, in Johannesburg, Plaintiff and Defendant acting in their personal capacities, orally agreed to the manner in which each party would contribute to the expenses of the common home and of the minor children ('agreement').

4.5 The material express, alternatively implied terms of the agreement were inter alia:

4.5.1 Plaintiff would pay:

4.5.1.1 annual medical contributions;

4.5.1.2 school fees for both minor children;

4.5.1.3 contribute a 50% share to groceries;

4.5.1.4 electricity

4.5.1.5 charges to Avis Car rental

4.5.1.6 contribution to the minor children's school uniforms;

4.5.1.7 for DSTV charges at the common home;

4.5.1.8 all rates and taxes in respect of the common home;

¹ (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

4.5.1.9 pay 60% of the monthly amounts due in respect of the home loan for the former common home;

4.5.1.10 On or about December 2017 at Johannesburg, Gauteng, Plaintiff caused water to be poured into Defendant's Mini motor vehicle's engine and damage was caused to the engine, the repairs of which cost in the region of R 14 000.00, which was paid by Defendant.

4.5.1.11 In June 2018 at Johannesburg, Gauteng, Plaintiff and Defendant, both acting personally, orally agreed that Plaintiff would reimburse Defendant for damages and repairs to the Mini motor vehicle in the amount of R 14 000.00, which he would do when he was in a position to repay the amount.

4.12 In and about August 2020, Plaintiff mandated Phungula Attorneys, and incurred legal fees in an amount of R 161 000.00.

4.13 Phungula attorneys threatened to execute against movable property in the former common home, and Defendant therefore paid the legal fees on Plaintiff's behalf in an amount R 161 000.00.

4.14 On or about 13 September 2021, at Johannesburg, Gauteng, Plaintiff and Defendant agreed orally in person that Plaintiff would repay Defendant R 161 000.00 when he was in a position to repay the amount.

4.15 On 8 October 2021, Defendant acknowledged in writing that he owes the Plaintiff an amount of R 1 410 800.00 for household expenses which Defendant paid on Plaintiff's behalf, as well as for the EWSETA loan, repairs to the Mini motor vehicle and amounts paid for the Plaintiff's legal fees to Phungula Attorneys ('acknowledgement of debt').

4.16 The detail of the acknowledgment of debt is included in the Excel spreadsheet prepared by Plaintiff and send to Defendant on 08 October 2021, attached hereto, marked 'CC1'.

4.17 In addition to the amount of R 1 410 800.00, Plaintiff furthermore confirmed that he owes Defendant an amount of R 647 200.00 for payments which Defendant had made on Plaintiff's behalf towards the home loan.

4.18 The detail of what Defendant paid towards the home loan is included in an Excel spreadsheet, as prepared by the Plaintiff, and sent to the Defendant in email correspondence dated 08 October 2021, attached hereto marked 'CC2'.

4.19 Plaintiff is therefore indebted to Defendant in the amount of R 2 08 000.00 as follows:

4.19.1 R 1 410 800.00 for various expenses in terms of the agreement, loans; and

4.19.2 R 647 200.00 for amounts which Defendant paid towards the home loan, and Plaintiff undertook to repay her'.

3 By including prayer 12A as follows:

12A Payment of R 2 058 000.00 to Defendant with interest *temporae morae*.'

[2] The plaintiff reacted to this application by filing a notice to oppose which was subsequently followed by an opposing affidavit. Defendant objected to the admission of the plaintiff's opposing affidavit. The reason being that the affidavit was not filed timeously as prescribed by the Rules and therefore application for condonation should fail.

[3] In addition, the defendant also sought relief to have numerous paragraphs of the plaintiff's opposing affidavit struck out for being vexatious, scandalous and/or irrelevant in the event that condonation is granted.

[4] The court will deal with the contents of the affidavit after resolving the issue of condonation.

Background

[5] During May 2023 plaintiff issued divorce summons against the defendant. On 27 June 2023 defendant delivered her plea and counterclaim. The plaintiff subsequently delivered his plea to the counterclaim on 14 July 2023. The pleadings were then deemed to be closed.

[6] The defendant is now bringing this application in order to amend the counterclaim and to include an additional relief. Details of the proposed amendments are detailed elsewhere above.²

Condonation

² Supra at para 1

[7] The applicable legal principles regarding condonation are a well-worn path. A party seeking condonation must provide details that caused the delay with sufficient particularity. The basis being that the said party is essentially seeking an indulgence from the court. The court in considering a condonation application is vested with judicial discretion to determine whether or not to grant same.

[8] The position was articulated as follows in the case of *Uitenhage Local Council v SA Revenue Services*³ that: '*Condonation is not to be had merely for the asking. A full detailed and accurate account of the cause of the delay and their effects must be furnished as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related, the date, duration, and extent of any obstacle on which reliance is placed, must be spelt out*'.

[9] In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus)*⁴ the constitutional court at para [22] elaborated further that: '*An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And what is more, the explanation given must be reasonable*'.

[10] The interest of a party in the finalization of the matter is another factor to be considered. This consideration was stated as follows in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*⁵ that: '*the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and avoidance of unnecessary delay in the administration of justice*'.

[11] In the present matter I am disabused of the fact that the delay was inordinate on the part of the defendant. The delay was for a mere 11days. Therefore, I am unpersuaded that the defendant acted in a flagrant and gross manner as it is clear that he—made reasonable efforts to comply with the Rules. In the premises condonation is granted.

Application to strike out.

[12] The defendant sought relief in the alternative that should condonation be granted, several paragraphs in the plaintiff's answering affidavit must be struck out

³ 2004 (1) SA 292

⁴ 2008 (2) SA 472 (CC)

⁵ [2013] All 251 (SCA)

on various grounds. I proceed to deal with this submission, which is also opposed by the plaintiff.

[13] The defendant is relying on Rule 6 (15)⁶ for its submission. Application to strike out can be brought against a pleading or affidavit. In this case it is sought against plaintiff's answering affidavit resisting defendant's application to amend her counterclaim.

[14] The court shall not grant the application to strike out unless it is satisfied that the party seeking such striking out will be prejudiced in its claim or defence.

[15] In *Beinash v Wixley*⁷ the court emphasised the two requirements to be satisfied before an application to strike out a matter from a pleading or affidavit can succeed. These requirements are: the matter sought to be struck out must indeed be scandalous, vexatious, or irrelevant; and the court must be satisfied that if such a matter was not struck out the party seeking a relief will be prejudiced.

[16] It has been held that the striking out procedure is not intended to be utilised to make technical objections which merely serve to increase costs and are of no advantage to the litigating parties. It is for these reasons that sufficient degree of prejudice should be present and such proof of prejudice is required. See the case of *Anderson and Another v Port Elizabeth Municipality*⁸.

[17] The meanings of the terms 'scandalous', 'vexatious' and 'irrelevant' are set out succinctly in the case of *Vaatz v Law Society of Namibia*⁹ where reference is made to the basic grammatical meaning given these terms in the *Shorter Oxford English Dictionary*. The court adopted the meanings assigned to the terms by the dictionary.

[18] The defendant has submitted that she will suffer prejudice and that a punitive costs order should be awarded against the plaintiff. It is however not clear in what respect such prejudice will come about. As the referenced authorities indicate, it is imperative that sufficient prejudice must be shown. I submit that prejudice must be

⁶ Rule 6(15) provides: 'the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, irrelevant, with an appropriate order as to costs, including costs between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.'

⁷ 1997 (3) SA 721 (SCA) at 733A-B.

⁸ 1954 (2) SA 299 (E)

⁹ 1991 (3) SA 563 (NM) at 566C, 566H-567B

deduced from the facts. On the facts of this case, I am unable to discern any such prejudice.

The law on amendment of pleadings

[19] The party seeking an amendment bears the onus of demonstrating its *bona fide* and that there is an absence of prejudice.¹⁰ See also *Moolman v Estate Moolman*¹¹ where the court held that: '(T)he 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 it is sought to amend was filed'.

[20] The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs.

[21] Alternatively the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?¹²

[22] A court hearing an application for an amendment has discretion on whether or not to grant it; a discretion which must be exercised judicially.¹³ The rule has been described as an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment.¹⁴

[23] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties; to determine the real issues between them so that justice may be done.¹⁵

[24] An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for

¹⁰ *Krische v Road Accident Fund* 2004 (4) SA 358 (W) at 363

¹¹ 1927 CPD 27 at 29

¹² *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C-D

¹³ *YB v SB* 2016 (1) SA 47 (WCC) at 50H-J of paragraphs [8] and [9]

¹⁴ *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC) at [89]

¹⁵ *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at par [8]

amendment is not timeously made some reasonably satisfactory account must be given for the delay. This is not the case in this matter.

The factors that prompted the Rule 28(4) Application

[25] The defendant seeks to amend paragraph 3.5 of her counterclaim. Paragraph 3.5 of the counterclaim previously stated that: *'Plaintiff has been involved in extra-marital affair for more than five years'*. And amendment that the applicant seeks to effect is that *'The Plaintiff has been involved in extra-marital affair(s) for the duration of the marriage.'*

[26] The defendant states that the amendments are necessary to clarify the duration plaintiff has allegedly been involved in extra-marital affairs. It is argued on her behalf that the duration of the infidelity by the plaintiff will assist the court in determining whether order of forfeiture of the marital benefits should be granted or refused.

[27] It is trite that the court has discretion to make an order of forfeiture of benefits if satisfied that the party against whom the order is sought would be unduly benefited in relation to the other party if the order is not made. The court must be able to impute some blame on a party against whom such order is made.

[28] The party claiming such relief needs to evince substantial misconduct on the part of the other. It is important that substantial misconduct is pleaded. I believe the period of time that the plaintiff is alleged to have been involved in extra-marital romantic relationship should be pleaded and evidence be produced at a trial.

[29] The legal position is encapsulated in Section 7(3)¹⁶ provides that: *'A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the [MPA] in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party'*.

¹⁶ Divorce Act, 70 of 1979

[30] The plaintiff will in my mind suffer no prejudice as he will have opportunity of a replication. Given what he has disclosed in his answering affidavit, he appears to have a reasonable basis to resist any negative findings against him.

[31] It is apposite to mention that pleadings are not to be confused with proof of what has been pleaded. As a matter of law, the purpose of a pleading is to define the issues in dispute. A pleading must constitute *facta probanda* and not *facta probanda*. I am satisfied that in respect of amendment of paragraph 3 the plaintiff will not suffer any prejudice.

[32] The defendant is also proposing a substantial amendment to paragraph 4 of the counterclaim. The grounds thereof relates to oral agreements which parties allegedly concluded regarding the expenses of the common household and the children. The agreement regarding a loan agreement between the parties where the defendant allegedly borrowed the plaintiff money.

[33] The envisaged amendment also deals with particulars pertaining to the damages allegedly caused by the plaintiff to the motor vehicle belonging to the defendant. In addition, the amendment seeks to incorporate an alleged acknowledgment of debt and also legal costs which the defendant paid on behalf of the plaintiff.

[34] It is contended by the defendant that the amendments are relevant for the purposes of the accrual calculation in the divorce proceedings. Defendant intends seeking relief that if found that her estate is showing a greater accrual plaintiff must forfeit any potential accrual claim in consequence of his substantial misconduct.

[35] I accept that the defendant could not possibly have been aware of the duration that plaintiff may have been involved in extramarital affairs. On the other hand, it is inconceivable that she was not aware of the loan agreements and the repayments personally made by her.

[36] The proposed amendments under paragraphs 4, 5 and 12A could not have been discovered after filing of her plea and counterclaim. The information was within the defendant's purview and intimately within her knowledge from the onset. She concluded this alleged agreement and even made payments towards the amortization thereof.

[37] Despite these observations the court must still be satisfied that the amendment will not prejudice the other party. It is important to note that the essential ground for the refusal of an amendment is prejudice to the other party. An amendment should not be refused merely in order to punish the party for some mistake or neglect on its part; the punishment should be a party being mulcted with wasted costs order. See in this regard *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd*¹⁷

[38] It is also established legal principle that: '*if the application to amend is mala fide or if the amendment causes an injustice to the other side which cannot be compensated by costs, or, in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted. The fact that the allowing of an amendment to a plea might be to defeat the plaintiff's claim is not what is meant by "prejudice" which cannot be remedied by an appropriate order as to costs. See Gmf Kontrateurs (Edms) Bpk ad Another v Pretoria City Council*¹⁸.

[39] The question is whether allowing an amendment in these circumstances will constitute irreparable prejudice in the sense that the plaintiff cannot be placed in the in the same position as he was in when the pleading now sought to be amended was filed. I am not persuaded that a costs order will cure prejudice that will be suffered by the plaintiff if amendment to paragraph 4 and addition of relief in paragraph 12A are allowed.

[39] For the above reasons I am not prepared to exercise my discretion in favour of the granting of the amendment currently sought in respect of paragraph 4 and paragraph 12A. These amendments, I am fortified constitute prejudice of a kind referred to in *Euroshipping Corporation of Monrovia v Minister of Agriculture and Others*¹⁹ which cannot be cured by a postponement or an order for the payment of wasted costs.

Order

It is ordered as follows:

1. Condonation for late filing of opposing affidavit is granted.

¹⁷ 1967 (3) SA 632 (D) at 640H;

¹⁸ 1978 (2) SA 219 (T)

¹⁹ 1979 (2) SA 1072 (C)

2. Application to strike out is granted.
3. Leave to amend para. 3 is granted.
4. Leave to amend para. 4, 5 and 12A is refused
5. Each party to pay own costs.

Thupaatlase AJ
Acting Judge

Date of Hearing: 18 October

Date of Judgment: 30 October 2023

Appearances:

For the Applicant/Defendant: Adv. K Mitchell

Attorneys: Smit Sewgoolam Incorporated

For Respondent/Plaintiff

In person