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

Case No. **40230/2020**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

SIGNATURE

DATE: **21 JUNE 2023**

In the matter between:

J[...] M[...] S[...]

Applicant

and

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

Respondent

IN RE:

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

Plaintiff

and

J[...] M[...] S[...]

Defendant

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This is an application for leave to amend pleadings in terms of Uniform Rule 28(10) brought by the applicant, the defendant in the action. The applicant seeks to amend his plea and counterclaim and in so doing, brings this application at the end of the proceedings and after he closed his case. The applicant does not tender the costs occasioned by the sought amendment and requests that the costs occasioned hereby should be costs in the action.

[2] The respondent, the plaintiff in the action, opposes the application for leave to amend at this late stage of the proceedings and seeks a punitive cost order.

[3] The action traverses a divorce action which is opposed. The action was initiated by the respondent in which she seeks, *inter alia*, the division of the joint community estate. This includes a claim of a 50% interest of the applicant's pension. The duration of the trial before me was 2 (two) days.

[4] The applicant had served a previous notice to amend his pleadings in terms of Rule 28(1) ("first proposed amendment") which he elected not to pursue. This aspect is dealt later.

[5] The applicant, under oath states that the reason for seeking leave to amend his pleadings at this stage, ("second proposed amendment") is to ensure that the pleadings now, albeit for the first time, align themselves with the facts as determined by the evidence. The applicant expands his reasoning by insisting that leave to amend is to shield the Court from drawing a judgment that does not correctly capture and record the true facts between the parties.

[6] It is appropriate in this matter to scrutinise the veracity of the reasons proffered *supra*, by revisiting the legal principles pertaining to amendments and by

dealing with the chronology of events which lead up to the second proposed amendment.

LEGAL PRINCIPLES

[7] 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.*”

[8] It is trite law that a Court hearing an application to permit an amendment has a wide judicial discretion, this is echoed in the wording of Rule 28(10).¹ When exercising such discretion whether to permit an amendment, the court is required to follow the well-established approach set out in **Moolman v Estate Moolman**²: Both Counsel relying on the Moolman approach. Which states that “[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.”

[9] The approach of the Moolman matter 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 and, where appropriate, a postponement.³ The power of the courts to allow even material amendments is therefore limited only by considerations of prejudice or injustice to the opponent in civil proceedings.⁴

¹ See **Embling v Two Oceans Aquarium CC** 2000 (3) SA 691 (C) 694G-H.

² 1927 CPD 27 at 29.

³ Footnote 1 *supra*, 694H-695D.

⁴ See Erasmus, Superior Court Practice, Vol 2 (2015) D1-332.

[10] Despite the above, the court's attitude towards 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.⁵ Notwithstanding the indulgence sought, the applicant failed to tender costs and in argument stated that it was not an indulgence being sought as the amendment is sought before judgment. This argument and reasoning is in contrast with a proper reading and understanding of Rule 28 as a whole and in terms of applied case law.

[11] The essential ground for refusal of an amendment is prejudice to the opponent, and an amendment should not be refused merely in order to punish the applicant for some mistake or neglect on his part, his punishment should be an order to pay the wasted costs occasioned by the amendment. 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.⁶

[12] The principle of the refusal of an amendment that the party seeking it is *mala fide*, takes on a different perspective once an application to amend is brought before a Court after the commencement of the trial. This is because it is usually inappropriate for a trial judge to express an opinion as to the credibility of a witness before the parties have closed their cases.⁷ Both parties have closed their case however I am mindful that matter may become part heard and shall not entertain the credibility of the parties.

[13] Notwithstanding the above principles, in particular the well-established approach in the **Moolman** matter supra, Willis J in **Randa v Radopile Projects CC**⁸ 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

⁵ See **Minister van die SA Polisie v Kraatz** 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.

⁶ **Bankorp Limited v Anderson-Morsehead** 1997 (1) SA 251 (W) 253E-F.

⁷ See par 17 with reference to **Vilakazi v Santam Assuransie Maatskappy Beperk** 1974 (1) SA 23 (A) 26G-27A.

⁸ 2012 (6) SA 128 (GSJ).

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.”

[14] Willis J's approach appears to have kept up with modern times with the concept of access to justice which has taken on a position of paramount importance. The commencement and continuation of a civil trial has become sacrosanct in recent times with a pressing need to eradicate unnecessary and costly postponements which give rise to a diminishing of valuable legal resources which, indirectly, hampers access to justice in the form of speedy and cost-effective civil trials, encapsulating the ideal Section 34 of the Constitution.

[15] This approach too, aligns itself with the primary objective of allowing an amendment which is to obtain a proper ventilation of the dispute between the parties, in order to determine the real issue between them, so that justice might be done. The objective affirmed by the Supreme Court of Appeal in an unanimous judgment of **Ciba-Geigy (Pty) Limited v Lushof Farms (Pty) Limited en 'n Ander**⁹ where Caney J held that: “*‘the primary principle’ was to allow ‘a proper ventilation of the dispute between the parties’ and another ‘the vital consideration’ was whether prejudice could ‘be cured by an order for costs and, where appropriate, a postponement’.*”

[16] The record of the proceedings illustrate that the applicant elected not to place his version before Court before hearing all the evidence. In the recorded minute of the second pre-trial meeting between the parties held on the of the 28 April 2022 the applicant recorded the reason for not prosecuting the first proposed amendment by stating that he did not want to incur the unnecessary expense of an interlocutory application for leave to amend in terms of Rule 28(4) and that “*The issue can easily be resolved at trial, the aspect can be put to any witness.*”

⁹ 2002 (2) SA 447 (SCA) at par [34].

Reference to the issue although not clear appears to the signature of a contract marked **CC1** to the first proposed amendment at that time.

[17] It appears that the applicant's intention was to, on the date of the hearing rather gain the advantage by first waiting to hear all the evidence, tender his own evidence and then only amend his pleading to accommodate his version. Acting on this intention the applicant brings this application.

[18] Against this backdrop I now deal with the application before me.

[19] To exercise my discretion in terms of Rule 28 I now turn to consider the relevant common cause and admitted facts and the chronology of events regarding the second proposed amendment.

[20] The Common cause and admitted facts (relevant to the application) are:

- 20.1 On the 14 February an at Hammanskraal, the applicant and respondent married each other in terms of customary law which marriage still subsists.
- 20.2 The customary union was not registered at the offices of Home affairs.
- 20.3 One child was born from the marriage. All aspects relating to the minor child are settled are were not contentious.
- 20.4 The marriage has broken down irretrievably.
- 20.5 On the 28 January 2020 both the applicant and respondent concluded a written contract called an Antenuptial contract in the presence of a Notary public.
- 20.6 Both the applicant and respondent are recorded in the Antenuptial contract as "not married".

[21] On the unamended pleadings before Court at trial, the applicant admitted being married to the respondent by customary union in community of property.

[22] I now turn to the chronology of the events regarding the second proposed amendment.

22.1 On the 20th of January 2021 the applicant served its plea and counterclaim (the unamended pleadings).

22.2 On the 1st of March 2022 the matter was set down for trial for the first time. The applicant then informed the respondent that he wished to amend his plea and counterclaim. The applicant had found a contract in his garage stating "*the document evidencing the true factual position*". A factual position he wished to place before Court. In so doing, the trial of the 1 March was postponed affording the applicant an opportunity to place his amended version before Court. The applicant was ordered to pay the wasted costs occasioned by the postponement.

22.3 On the 8th of March 2022 the applicant served the first proposed amendment, a notice in terms of Rule 28(1) of his intention to amend his plea and counterclaim. His notice was met with an objection in terms of Rule 28(3). The thrust of the objection, *inter alia*, was the withdrawal of an admitted fact namely the withdrawal of the admission that the parties were marriage to each other in community of property. The applicant pleaded a customary marriage, one out of community of property, no community of profit or loss excluding the accrual system provided for in terms of Chapter 1 of the Matrimonial Property Act, 1984, as amended and referred to annexure **CC1** in support of the allegation. The applicant in this first proposed amendment referred to **CC1** as a post nuptial contract signed on the 28 January 2020.

- 22.4 **CC1** was headed “Antenuptial contract” and was not a postnuptial contract as relied on. Herein lies the conundrum at the trial before me. This aspect will be elaborated on below.
- 22.5 The applicant faced with a Rule 28(3) objection, failed to request leave to amend and effect his amendment in terms of Rule 28(4). The proposed amendment not ventilated and the pleadings remained unamended. In consequence, the applicant had failed to amend his pleadings this, contrary to the intention he expressed before the AJP Ledwaba at the hearing of the trial roll on the 1st of March 2022.
- 22.6 Thereafter during the second pre-trial held on the of the 28th of April 2022 the respondent in the minute, under the heading of ‘prejudice’ enquired from the applicant whether he intended to proceed formally to apply for leave to amend his plea and counterclaim as provided for in terms of Rule 28 as the time period afforded in terms of the rules has expired. The applicant replied that he would apply for the amendment in terms of Rule 28(10) at the hearing of the matter to avoid costs associated with a formal application to amend. His procedural intention had clearly changed from the 1 March 2022.
- 22.7 The reason for the procedural election and timing of the proposed amendment in the pre- trial minute not only differed from the reason given for the postponement on the 1 March 2022 but differed from the reason proffered by the applicant in the preamble of his founding papers.¹⁰
- 22.8 The respondent now anticipating an amendment recorded their prejudice in detail in the minute (relying on the applicant’s version set out in the first proposed amendment). the thrust of the prejudice was withdrawal of an admission, the introduction of a

¹⁰ See paragraph [5] hereof.

new cause of action and the inability for the respondent to prepare for trial being unsure of or a case that they were required to meet at trial.

22.9 In response *supra*, the applicant recorded that the respondent was in possession of a version sought to be led at trial, that there could be no prejudice, relying on the Estate Moolman matter, the respondent had been paid for their wasted costs, the applicant recorded that the objection in terms of Rule 28(4) was *mala fide* and unreasonable and that the respondent wished to have the trial court adjudicate the matter on a common mutual mistake between the parties, that being that both applicant and respondent had erroneously recorded their marriage as a marriage in community of property while it ought to have been a marriage out of community of property, as a fact, a post-nuptial contract was signed. Stating further “*it is this version that the defendant (applicant) seeks to rectify and align with reality.*” Applicant’s counsel referring to the recorded intent as the post-nuptial contract. This echoed in the first proposed amendment.

22.10 The parties obtained a preferential Court date on the 7th of November 2022. The trial did not commence for lack of available judges. At this stage the pleadings had still not been amended to contain allegations in support of the applicant’s version.

22.11 For the above reasons, the respondent’s counsel at the commencement of the proceedings before me and before commencing with the respondent’s case sought clarity of the applicant’s intention to move the amendment in terms of Rule 28(10). The applicant’s counsel too, had indicated on the morning of the trial that he would move for the amendment at the end of the hearing.

- 22.12 The applicant once again recorded the prejudice to be suffered in such an event and recorded the objection to evidence lead contrary to the unamended pleaded case. The applicant's counsel argued that they were not inclined to move an amendment at this time, that **CC1** had been discovered and was part of the trial bundle and would be put to the relevant witnesses.
- 22.13 Both parties where questioned extensively on this point. The applicant's counsel gave the Court the assurance that it would become abundantly clear that an interlocutory Court determination would not become necessary. In a nutshell counsel for the applicant stated that they would seek to introduce an error common to both parties, *ex facie* the document (**CC1**) and in that way, there would be no need to amend their papers as proposed, save costs and move for the amendment of their papers in terms of Rule 28(10) once the evidence had been tendered to align the papers with the evidence.
- 22.14 An untenable assurance, this is before the applicant even knew what the respondent's evidence would be with regard to **CC1**. Untenable yet even further on the pleadings as they stood.
- 22.15 For this reason and applying Willis J approach in the Randa matter, "*.. the commencement of a trial is the fulcrum upon which the courts' stance in respect of applications for amendments to pleadings should be balanced*", I issued a ruling namely: The triable issue on the papers was the division of the joint estate, the respondent's objection to evidence being led outside the triable issue was noted and as a result of the election of the applicant not to amend their pleadings at the commencement of the trial. I confirmed that the applicant, having been faced with an objection in terms of Rule 28(3) to the proposed amendment had, in terms of Rule 28(4) elected not to seek leave for an amendment. The second pre-trial had foreshadowed the applicant's intention to

bring the Rule 28(10) at trial. Presently, there was no application for leave to amend before me. The matter was to proceed on the papers as they stood, the objection noted and if any amendment was to be brought it was to be brought by way of a substantive application.

INJUSTICE

22.16 At the commencement of the trial the applicant did not, as he now in his founding papers wishes to do, amend his pleadings because *“The pleadings in this matter do not correctly align with reality”*.

22.17 The reality as evidenced during the proceedings was that **CC1** is in fact a antenuptial contract and not a post-nuptial contract and in consequence did not support the applicant’s version set out in the first proposed amendment (paragraph 1.7 of the plea read with 2.3 of the counterclaim) nor the recorded pre-trial minute version in April 2022 nor for that matter the second proposed amendment (See paragraph 1.13 which still refers to a post-nuptial contract).

22.18 The applicant brings this application after waiting till all the evidence was led and after hearing all the versions now wishes ‘align his pleading with reality. Of importance is that this is not one of those matters where a party, at the last minute learns of a fact pertinent to the ventilation of the dispute and now wishes to amend the pleadings to bring all the relevant facts before Court.

22.19 The applicant on his own version knew of this relevant fact, **CC1** at least on or before the 1 March 2022 (first trial date). This is more than a year ago. Therefore, for more than a year the applicant elected not to ‘align his pleadings with reality’. Herein lies an injustice.

22.20 The chronology of the events demonstrates that the applicant elected not to place his version before Court as is required to

crystalise the issues and assist the Court nor pen it down nor to assist the respondent in allowing her to know exactly what case she had to meet. It appeared that the applicant wished to test the respondent's version when confronted with **CC1** before penning down his version. Herein lies an injustice.

- 22.21 Being faced with a conundrum at trial, **CC1** being an antenuptial contract and not a postnuptial contract as previously relied on (first proposed amendment and recorded version in the pre-trial minute) caused an obstacle for the applicant, which he now wishes to rectify by the second proposed amendment after hearing all the evidence. Herein lies the injustice.

[23] Having regard to the above, the parties cannot be put back for the purposes of justice in the same position as they were if the pleading which is sought to amend is filed. Nor for that matter can costs compensate for the injustice.

PREJUDICE

- 23.1 Having regard to the papers and the evidence, the version being introduced by the second proposed amendment differs from the version on the pleadings, it differs from the version in the first amendment, it differs from the evidence elicited during cross examination when the applicant stated that according to him both he and the respondent did not believe that they were even married until they went to Home Affairs "*Ja, according to both of us, we were unmarried*". It was only after the respondent had consulted with his attorney, Mr Momagwe, with the document in hand (the antenuptial contract – own emphasis), "*that I have paid lobola, that this is the document that we signed* (own emphasis) and he told me, *no you are married customarily*" and it differs from the second proposed amendment as previously dealt with. Herein the confusion with substantial consequences. Herein lies the prejudice.

- 23.2 The second amendment in terms of Rule 28(10) if granted, may trigger an number of permissible procedures including an exception in terms of Rule which the respondent Counsel raised in her heads relying on **Cross v Ferreira** ¹¹ in which the weight of authority (reviewing decisions in the SCA up to 1950) favoured the view that if the pleading sought to be amended would be excipiable, this affords a ground upon which a Court may exercise its discretion to refuse an amendment.
- 23.3 The respondent's Counsel argued that the if the amendment is granted, the applicant's plea and counterclaim would not disclose a cause of action in that the applicant now relies on a marriage to be declared regulated by a antenuptial contract signed 5 (five) years after the marriage was concluded (in 2015). The law is clear on this aspect that an antenuptial contract to be valid and enforceable is to be signed before a Notary public by both parties prior to the conclusion of the marriage. Signature prior to the marriage thereof, is an admitted fact before Court.
- 23.4 Furthermore, the respondent's counsel argued that the rule of law dictates that the dissolution of in community of property cannot be effected by the conclusion of an antenuptial contract and the parties are to proceed within the permissible statutory ambit of the Matrimonial Properties Act 88 of 1984 alternatively the Recognition of Customary Marriages Act 120 of 1998.¹² On the proposed second amendment there appears to be no triable issue. The respondent's argument and applying the **Cross** matter must be considered as a factor in exercising my discretion. The applicant 's counsel is silent on the point in his heads of argument.
- 23.5 If allowed, the second proposed amendment may also trigger the following procedural steps: a further amendment sought by the

¹¹ 1951 (2) SA 435 (C).

¹² See *Ex Parte Menzies Et Uxor* 1992 (3) SA 609 9W0.

respondent to deal with her version *vis a vis*, the amended pleadings, the exchange of yet further pleadings to crystallise the dispute, the possibility of the respondent' having to request leave to re-open her case to lead further evidence. All of which results in yet further costs and a part-heard matter. The consequence causing immeasurable prejudice to the respondent hampering her access to justice in the form of speedy and cost-effective civil trial, this after the applicant was requested to amend and cautioned. Herein lies the prejudice. The parties have closed their respective cases. Leave to reopen the case and the consequence of a part heard matter are foreseeable.

23.6 Awarding costs will not cure the multiple procedural consequences and hurdles.

[24] The applicants intention to bringing the application to shield the Court from being unable to adjudicate the issue is misplaced. The issue regarding regarding **CC1** has been ventilated.

[25] Having regard to all the facts, the circumstances and weighing the factors for consideration in the exercise of my discretion, the application to amend should be refused.

[26] Speaking to my directive referred to in the heads of argument, the directive was dated the 5 May 2023 for circulation. The dates following accordingly. No party requested an extension of time.

COSTS

[27] The respondent requests a punitive cost order on attorney own client scale and rely on the pre-warning given to the applicant. No further grounds which speak to a punitive costs in their heads of argument are concisely raised.

[28] Costs are in the Courts discretion and although consideration has been given to the applicant's lack of tendering and too the circumstances leading to the

application I am not inclined to simply grant a punitive cost order. I am however inclined to ensure that the respondent not be prejudiced by a cost order.

[29] It flows that the following order is made:

1. The application is dismissed with costs;
2. The costs referred to in prayer 1 to be paid solely by the applicant without causing any financial prejudice to the respondent.

L.A. RETIEF
Judge of the High Court
Gauteng Division

Appearances:

Counsel for the Applicant:	Adv K Mvubu
Attorney for the Applicant	Moumakoe Attorneys
Reference:	RAM/sm/MAT 0899

Counsel for the Respondent:	Adv N Erasmus
Attorney for the Respondent:	Shapiro & Ledwaba Inc
Reference:	A Shapiro/ls/n0293

Date of hearing:	3 April 2023
Date of judgment:	21 June 2023