



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

CASE NO: 2023-030132

- | | |
|----|----------------------------------|
| 1. | Reportable – No |
| 2. | Of interest to other Judges – No |
| 3. | Revised |

	<u>15.05.2024</u>
Signature	Date

In the matter between:

MARTHA KATIE KITIMS (*born Mathyse*)

Applicant/Plaintiff

and

CHARLES STEVEN KITIMS

Respondent/Defendant

JUDGMENT

PRETORIUS AJ

INTRODUCTION

- [1] This matter pertains to an opposed Application for Leave to Amend in terms of the provisions of Rule 28(4) of the Uniform Rules of Court. However, on the date of hearing, and prior to argument commencing, I was informed by the parties' representatives that the Respondent/Defendant's objection to the proposed amendment was being withdrawn and that the only issue remaining for determination by me was the aspect of costs, being the costs arising from the proposed amendment, on the one hand, and the costs of the opposition thereto, on the other hand. Before dealing with the submissions made on behalf of the parties in respect of the costs, as aforesaid, and my findings in regard thereto, it is apposite to first give a brief background to the matter.

BACKGROUND

- [2] The Applicant in this matter is the Plaintiff, and the Respondent is the Defendant, in a contested divorce action between the parties. The divorce action was instituted on *30 March 2023*.¹ The parties are married in community of property and there are no children born of their marriage.²
- [3] The Respondent/Defendant served a Plea and Counterclaim on *28 June 2023*.³ Pursuant thereto, and on *17 July 2023*,⁴ the Applicant/Plaintiff, served a Notice of Intention to Amend her Particulars of Claim. In terms of the proposed amendment, the Applicant/Plaintiff wished to introduce a claim for forfeiture of the patrimonial benefits of the joint estate. The claim for forfeiture was limited to the Respondent/Defendant's claim, as pleaded in his Counterclaim, for 50% of the Applicant/Plaintiff's pension interest.⁵ The basis of the Applicant/Plaintiff's claim for forfeiture was the alleged financial misconduct and

¹ CaseLines, 01-14 to 01-27

² CaseLines 01-19

³ CaseLines, 01-40 to 01-46

⁴ CaseLines, 02-96 to 02-102

⁵ Defendant's Counterclaim: CaseLines 01-44 to 01-46

infidelity on the part of the Respondent/Defendant during the course of the marriage.⁶

[4] The Respondent/Defendant thereafter, and on *25 July 2023*, served a Notice of Objection to the proposed amendment in terms of Rule 28(3).⁷ The basis of the Respondent/Defendant's objection was that:-

- 4.1 since the service of the Summons in and during *May 2023*, nothing had changed to warrant amendments of the Applicant/Plaintiff's Particulars of Claim because the circumstances of the matter had remained the same as at the date of the Applicant/Plaintiff's Notice of Amendment;⁸
- 4.2 the Notice of Intention to Amend was *mala fide* and the proposed amendment would cause injustice to the Respondent/Defendant which injustice could not be compensated by an order for costs;⁹
- 4.3 the Notice of Intention to Amend was prejudicial to the Respondent/Defendant, as he had already filed his Plea;¹⁰
- 4.4 the proposed amendment sought to introduce a new cause of action;¹¹
- 4.5 the proposed amendments were vague, embarrassing and therefore excipiable;¹² and
- 4.6 the Applicant/Plaintiff did not state what prejudice she would suffer should the proposed amendment not be allowed.¹³

⁶ CaseLines, 02-97 to 02-102

⁷ CaseLines, 02-65 to 02-68

⁸ Respondent/Defendant's Notice of Objection in terms of Rule 28(3): par 1 thereof, CaseLines: 02-66

⁹ Ibid: par 2, CaseLines: 02-66

¹⁰ Ibid: par 3, CaseLines: 02-66

¹¹ Ibid: par 4, CaseLines: 02-67

¹² Ibid: par 5, CaseLines: 02-67

¹³ Ibid: par 6, CaseLines: 02-67

- [5] Given the Respondent/Defendant's objection to the proposed amendment, as aforesaid, the Applicant/Plaintiff, on *08 August 2023*,¹⁴ served an Application in terms of the provisions of Rule 28(4) for leave to amend her Particulars of Claim, with the date of enrolment in respect thereof being *09 October 2023*. The Respondent/Defendant served a Notice of Opposition and Opposing Affidavit on *19 September 2023*¹⁵. Pursuant thereto, the Applicant/Defendant removed the matter from the unopposed roll¹⁶ of *09 October 2023*, and served a Replying Affidavit on *10 October 2023*.¹⁷
- [6] On *13 November 2023*, the Applicant/Plaintiff's attorneys served their Heads of Argument and Practice Note, a List of Authorities, and Chronology.¹⁸ The matter was thereafter enrolled on the Family Court Opposed Motion Roll for *04 March 2024* and a Notice of Set Down was served on *19 February 2024*.¹⁹ The Applicant/Plaintiff filed an updated Practice Note on *23 February 2024*.²⁰ It is common cause that despite the opposition to the proposed amendment, no Heads of Argument and Practice Note were filed on behalf of the Respondent/Defendant. Respondent/Defendant's Counsel, Mr Liphosa, indicated to the Court, at the hearing of the matter, that he had come into the matter at the eleventh hour, as it were, and hence no Heads of Argument and Practice Note were filed on behalf of the Respondent/Defendant.
- [7] In the Notice of Motion in respect of the Application for Leave to Amend in terms of Rule 28(4), read together with the Founding Affidavit, in addition to seeking leave to amend as per the Notice of Amendment in terms of Rule 28(1), the Applicant/Plaintiff further seeks that the Respondent/Defendant's attorneys be ordered to pay the costs of this Application, *de bonis propriis*, on the attorney client scale, as the objection to the proposed amendment is allegedly based on a "*failure to understand the court rules*", resulting in the Application being unnecessary and a "*sheer waste of time and money*". In the Heads of Argument

¹⁴ Applicant/Plaintiff's Founding Affidavit, Annexure "MKK3" thereto, CaseLines 02-54

¹⁵ CaseLines, 02-111 to 02-114, and 01-1 to 01-11

¹⁶ CaseLines, 02-56 to 02-58

¹⁷ CaseLines, 01-28 to 01-38

¹⁸ CaseLines, 04-13 to 04-16

¹⁹ CaseLines, 02-59 to 02-62

²⁰ CaseLines, 04-24 to 04-28

filed on behalf of the Applicant/Plaintiff, it is further submitted that the Respondent/Defendant's attorneys were negligent in objecting to the proposed amendment.²¹ In the alternative, and in the event of the Court not being inclined to grant the aforesaid costs order, the Applicant/Plaintiff seeks costs against the Respondent/Defendant himself, on the attorney client scale.

- [8] In the Respondent/Defendant's Answering Affidavit, the grounds of objection contained in the Notice of Objection in terms of Rule 28(3), referred to above, are elaborated upon and it is further stated that the proposed amendment is unnecessary, unreasonable, and constitutes an abuse of Court process, as the Applicant/Plaintiff did not claim forfeiture in her Particulars of Claim. It is further stated that the Applicant/Plaintiff can simply plead to the Counterclaim, i.e. that the proposed amendment is therefore unnecessary.²² It is further denied that the Respondent/Defendant's attorneys should be liable for costs *de bonis propriis* and it is stated that costs should rather be awarded *de bonis propriis* against the Applicant/Plaintiff's attorneys when the Application for Leave to Amend is dismissed.²³
- [9] Against the backdrop of the foregoing, I shall now turn to deal with the submissions made by the parties' representatives, at the hearing of this matter, in respect of costs,.

SUBMISSIONS MADE AT THE HEARING IN REGARD TO COSTS AND FINDINGS IN RESPECT THEREOF

Costs occasioned by the proposed amendment

- [10] Insofar as the costs in respect of the Applicant/Plaintiff's proposed amendment are concerned, I asked the Applicant/Plaintiff's representative, Mr Mukwani, to address me on such costs, as it was not apparent from either the

²¹ Notice of Motion Application for Leave to Amend in terms of Rule 28(4): par 3, CaseLines 02-31; Founding Affidavit: paras 22 to 24, CaseLines 02-40; Applicant/Defendant's Heads of Argument: paras 17 and 18, CaseLines 04-7

²² Respondent/Defendant's Answering Affidavit: paras 8.1 to 8.3, 15, 15.1 to 15.2, 18, 21, and 25.1 CaseLines, 01-6 to 01-9

²³ Ibid: paras 25 and 25.1, CaseLines 01-9

Applicant/Plaintiff's Notice of Intention to Amend²⁴ in terms of Rule 28(1), or from the papers filed on behalf of the Applicant/Plaintiff, as to who should be liable for these costs.

- [11] Mr Mukwani responded by submitting that it was not necessary for the Applicant/Plaintiff to have tendered such costs in the Notice of Amendment *per se*, as there was nothing in Rule 28 requiring the same. I agree with the submission. He, however, further submitted that it would only be necessary for the Applicant/Plaintiff to tender any wasted costs occasioned by the amendment in circumstances where the Respondent/Defendant were to request such costs and this, notwithstanding that Mr Mukwani accepted that the Respondent/Defendant may need to amend his pleadings by virtue of the proposed amendment. I was surprised by Mr Mukwani's aforesaid submission, as same is clearly incorrect and not in accordance with the provisions of Rule 28(9), which provides that any party giving notice of amendment in terms of Rule 28(1) shall, unless the Court otherwise directs, be liable for any costs thereby occasioned to any other party.
- [12] In regard to the costs occasioned by the Applicant/Plaintiff's Notice of Intention to Amend are concerned, Mr Liphosa, in his answering address, submitted that such costs would include the time that would be required to consider the proposed amendment in conjunction with the existing pleadings filed in the matter and to weigh up any potential prejudice to the Respondent/Defendant that may flow from the proposed amendment. He further submitted that amendments are costly in any proceedings, that costs come with the territory when pleadings are amended and that who other, than the party who is seeking to amend, should tender the costs attendant upon such amendment. I agree with these submissions. Having said that, however, Mr Liphosa submitted that the awarding of costs, both in respect of the proposed amendment and the opposition thereto, at this juncture, would increase the animosity between the parties, and that the aforesaid costs should therefore be reserved. For the reasons which appear more fully hereinbelow, I am neither inclined to reserve

²⁴ CaseLines 02-96 to 02-102

the costs arising from the proposed amendment, nor the costs of the opposition thereto.

- [13] It was only after Mr Liphosa had made his submissions, in answer, that Mr Mukwani, in his address in reply, acceded, which accession is noted by me, that in terms of the provisions of Rule 28(9), the Applicant/Plaintiff is liable for any costs to the Respondent/Defendant as may be occasioned by the proposed amendment.
- [14] In the premise, in accordance with the provisions of Rule 28(9), and as I am not inclined to direct otherwise, as I would be entitled to do in terms of the *proviso* contained in Rule 28(9), the Applicant/Plaintiff is liable to the Respondent/Defendant for any costs to the Respondent/Defendant as may be occasioned by the proposed amendment, said costs to be on the scale as between party and party.

Costs of opposition to the proposed amendment

- [15] In regard to the costs of the opposition to the proposed amendment, Mr Mukwani contended that the Respondent/Defendant's attorney should be ordered to personally pay the costs of this Application, *de bonis propriis*, on the attorney and client scale. As authority for this submission, albeit that Mr Mukwani did not address me thereon at the hearing of the matter, Mr Mukwani, as per his Heads of Argument,²⁵ relied on the matter of *Lushaba v MEC for Health, Gauteng*.²⁶ I shall comment on the relevance and applicability of the aforementioned authority hereunder. In the alternative, Mr Mukwani submitted that should the Court not be inclined to grant such an Order, that the Respondent/Defendant should be ordered to pay the costs of this Application on the punitive attorney and client scale. For the reasons which appear more fully hereinbelow, I am not inclined to grant either of the orders prayed for.

²⁵ Applicant/Plaintiff's Heads of Argument: paras 17 & 18, CaseLines 04-7

²⁶ 2015 (3) SA 616 (GJ)

[16] In respect of the costs relating to the opposition to the proposed amendment, Mr Liphosa submitted that the Applicant/Plaintiff's proposed amendment raises the issue of forfeiture of benefits and gives rise to a dispute of fact in regard thereto, and that the Respondent/Defendant had, in the circumstances, been advised to object to the proposed amendment, such advice neither warranting a costs order *de bonis propriis* against the Respondent/Defendant's attorney nor that the Respondent/Defendant should be ordered to pay the costs of opposing the amendment on the attorney and client scale. As stated above, Mr Liphosa's submission was further that costs in respect of the objection to the proposed amendment should be reserved. I reiterate that, for the reasons which appear more fully hereinbelow, I am not inclined to reserve the costs of the opposition to the proposed amendment.

[17] In my mind, the following excerpt from the judgement by Hefer J, in the matter of Hart v Broadacres Investments Ltd²⁷, and the authorities referenced therein, succinctly sets out the position with regard to the aspect of costs in the context of amendments:

"Naturally, as has often been stated, the grant of an amendment is an indulgence to the party requiring it, which entails that he is generally liable for all the costs occasioned by or wasted as a result of the amendment. These costs have sometimes been held to include 'the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous' (per van Winsen AJ (as he then was) in Myers v Abramson 1951 (3) SA 438 (C) at 455... In other cases, however, the costs of unsuccessful opposition were not so included and the unsuccessful objector was ordered to pay the costs occasioned by his opposition even though it was not considered unreasonable or vexatious or frivolous (See e.g. Wahlen v Gramowsky 1924 SWA at 52; Moolman v Estate Moolman 1927 CPD 27 at 29)... It seems to me, when it comes to deciding in any particular case whether the party to whom an indulgence is granted is to pay the costs of opposition, that the recognition of a single criterion for liability (such as the reasonableness of the opposition) tends to hamper the exercise of the unfettered judicial discretion which a court has in its award of costs. The exercise of that discretion is,

²⁷ 1978 (2) SA 47(N)

after all, essentially a matter of fairness to both sides (Gelb v Hawkins 1960 (3) SA 687 (A) at 694; Ward v Sulzer 1973 (3) SA 701 (A) at 706), and a criterion which may be useful in one case may in other cases not have the desired fair effect.”²⁸

- [18] In the matter of *Gcanga v Mutual Insurance Association Ltd*,²⁹ it was held that it is implicit in the procedure prescribed in Rule 28 that an objection to a notice to amend must be reasonably and responsibly taken. If an objection is taken merely to inconvenience the litigant seeking the amendment, or in an attempt to compel the amending party to incur the costs of an application to Court, when the opposing party has no real grounds for objecting and either does not appear in Court at all to oppose the application or appears and raises some frivolous objection, then the Court will be likely to order the objecting party to pay all the costs in respect of the application.³⁰ The fact that the opposition to a proposed amendment is reasonable does not necessarily entitle the opposing party to an order for costs. Unsuccessful opposition to a proposed amendment may result in the objecting party being ordered to pay the costs notwithstanding the fact that the opposition was reasonable.³¹ Eksteen J also stated the following:-

“On the other hand, I do not want to be understood as to mean that as a general rule costs in such applications will follow the result, or that in certain circumstances the respondent might not be ordered to pay the costs of opposition, or even that the opposition might be able to have been so reasonable as to warrant an order that the applicant pay all the costs. Each case in my view must depend on its own merits and the discretion of the Court to make an order which is fair in all the circumstances must remain unfettered.”³²

- [19] In the *Gcanga v Mutual Insurance Association Ltd* matter, the Court found the objection to the proposed amendment to be unwarranted and unreasonable in the circumstances of the matter and ordered the objecting party to pay the costs of the application for amendment, on the party and party scale.³³

²⁸ Ibid: at page 51, paras D to H

²⁹ 1979 (3) SA 320 (E)

³⁰ Page 330, paras A and B

³¹ Ibid: paras D to E

³² Ibid: paras C to D

³³ Ibid: par E, and par 3 of the order

- [20] Given the Respondent/Defendant's withdrawal of the objection to the proposed amendment at the last minute, being on the day of the hearing before argument commenced, I am not, as a result, called upon to deliberate on the merits of the proposed amendment and the objection thereto. In passing, however, I mention that the reason advanced by the Applicant/Plaintiff for effecting the amendment was that the Applicant/Plaintiff, when issuing her Summons, never anticipated that the Respondent/Defendant would make a counterclaim seeking 50% of the Applicant/Plaintiff's pension fund interest.³⁴ It is strange that the Applicant/Plaintiff did not anticipate this, given that the Applicant/Plaintiff and Respondent/Defendant are married to one another in community of property. Further, and in passing, the Respondent/Defendant's submission to the effect that the Applicant/Plaintiff's proposed amendment to introduce a claim for forfeiture was unnecessary, as the Applicant/Plaintiff could merely plead to Respondent/Defendant's Counterclaim in this regard³⁵, is incorrect. The Applicant/Plaintiff would be obliged to introduce the same, given that it constitutes a claim, in her Particulars of Claim, to be amended.
- [21] When considering the Respondent/Defendant's opposition to the proposed amendment, in totality, I do not find the same to have been vexatious or frivolous. I am not required to decide, by virtue of the Respondent/Defendant's withdrawal of the objection, whether the objection and opposition was reasonable as, in my view, the Respondent/Defendant's withdrawal of the objection to the proposed amendment on the day of the hearing, equates to nothing less than an unsuccessful opposition to the proposed amendment.
- [22] But for the Respondent/Defendant's objection to the proposed amendment, there would have been no need for the Applicant/Plaintiff to have approached the Court for leave to amend. There is, in my view, no reason why the Respondent/Defendant, who is for all intents and purposes, the unsuccessful party to this Application, should not bear the costs of the opposition thereto.

³⁴ Founding Affidavit: par 15.2, CaseLines 02-39

³⁵ Answering Affidavit: par 8.2, CaseLines 01-6, and par 25.1, CaseLines 01-9

The question is whether the Respondent/Defendant's attorneys should bear the costs, *de bonis propriis*, on the attorney client scale, or whether the Respondent/Defendant should be liable for the costs on the attorney client scale, and as prayed for by the Applicant/Plaintiff.

- [23] Respectfully, the reliance by Mr Mukwani on the matter of *Lushaba v MEC for Health, Gauteng*, referred to above, as the basis for seeking that the Respondent/Defendant's attorneys be ordered to pay the costs of this Application, *de bonis propriis*, is seriously misplaced and no reliance can be placed thereon, given that the order made in that matter on 26 November 2014, was set aside by the Constitutional Court in the matter of *MEC for Health, Gauteng v Lushaba*,³⁶ wherein the MEC for Health, Gauteng had applied, *inter alia*, for leave to appeal said order.
- [24] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*,³⁷ Fabricius J stated the following in respect of punitive costs orders, with specific reference to orders *de bonis propriis*:

"Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket...It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice,

³⁶ 2016 (8) BCLR 1069 (CC) and also 2017 (1) SA 106 (CC)

³⁷ 2014 (3) SA 265 (GP)

*irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care.”*³⁸

- [25] In the Constitutional Court matter of *Mkhatshwa and Others v Mkhatshwa and Others*,³⁹ Khampepe J, delivering the concurring judgment of the full Court, stated the following in regard to punitive costs on the attorney client scale:

*“Generally speaking, punitive costs orders are not frequently made, and exceptional circumstances must exist before they are warranted. In SARB, [being a reference to the matter of Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (6) SA 253 (CC)], this Court affirmed the following guiding principles in relation to punitive costs, elucidated by the Labour Appeal Court in Plastic Converters Association of SA: ‘The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably, vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.’ ”*⁴⁰

- [26] *In casu*, I am not persuaded that there are any exceptional circumstances warranting a punitive costs order against either the Respondent/Defendant’s attorneys or the Respondent/Defendant himself. Equally, in so far as the submission in the Respondent/Defendant’s Answering Affidavit to the effect that the Applicant/Plaintiff’s attorneys should pay the costs of this Application, *de bonis propriis*, should I have dismissed the Application,⁴¹ a submission which was clearly made before the Respondent/Defendant’s withdrawal of its opposition was contemplated, does not hold any water.

- [27] In the premise, and for the reasons stated above, I find that the Respondent/Defendant is liable for the costs of opposition to the proposed amendment, including the costs of the appearance on the date of hearing, on the scale as between party and party.

³⁸ Ibid: page 288, par G to page 289, par C

³⁹ 2021(5) SA 447 (CC) ; and 2021(10) BCLR 1182 (CC)

⁴⁰ Ibid: par 21, page 9; and footnotes 16 and 17; Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC)

⁴¹ Respondent/Defendant’s Answering Affidavit: par 25.1, CaseLines 01-9

ORDER

In the circumstances, the following Order is made:-

1. the Applicant/Plaintiff is granted leave to amend her Particulars of Claim;
2. by virtue of this Judgment having been reserved, and for the avoidance of any doubt, the Applicant shall, within 10 (*ten*) Court days, from the date of the electronic handing down of this Judgment by circulation to the parties' legal representatives, effect the amendment detailed in the Applicant/Plaintiff's Notice of Intention to Amend her Particulars of Claim, as served on *17 July 2023*, by delivering the amended pages of her Particulars of Claim in accordance with the amendment;
3. the Applicant/Plaintiff is to pay the costs of the Respondent/Defendant as occasioned by the amendment, on the scale as between party and party;
4. the Respondent/Defendant is to pay the Applicant/Plaintiff's costs occasioned by the Respondent/Defendant's opposition to the amendment, including the costs of the hearing on *04 March 2024*, on the scale as between party and party.


H.D.C PRETORIUS

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Electronically submitted

Delivered: This Order was prepared and authored by the Acting Judge whose name is reflected herein and is handed down electronically by circulation to the Parties / their legal representatives by e-mail and by uploading it to the electronic file of this matter on Court Online/CaseLines.

The date of the Judgment is deemed to be 15 May 2024.

Date Of Hearing: **04 March 2024**

Date Of Judgment: **15 May 2024**

APPEARANCES:

Counsel for Applicant: **Mr T Mukwani (*Attorney*)**

Instructed by: **T Mukwani Attorneys**

Counsel for Respondent: **Advocate R. Liphosa**

Instructed by: **Randela Attorneys Inc**