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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 3091/2021

REPORTABLE: YES / ~~NO~~

OF INTEREST TO OTHER JUDGES: YES/~~NO~~

REVISED: YES/NO

DATE 23/09/2025

SIGNATURE

In the matter between:

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

APPLICANT

and

E[...] S[...]

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 23 September 2025 at 14h00.

JUDGMENT

Msibi AJ

Introduction

[1] In this interlocutory application, the applicant (defendant in the main action) seeks leave to amend her counterclaim in the main action in terms of Rule 28(4) of the Uniform Rules of Court. The respondent (the plaintiff in the main action) opposes the application for leave to amend on various grounds.

[2] The divorce action was initiated by the respondent, in which he seeks, *inter alia*, a decree of divorce, primary care of the minor children and costs of suit.

[3] On 20 June 2024, the applicant delivered her notice to amend her pleadings in terms of Rule 28(1) (“the first proposed amendment”) indicating her intention to amend her counterclaim by adding a claim for a redistribution order in accordance with section 7(3) of the Divorce Act 70 of 1979 as amended by the Constitutional Court in the matter of *EB v ER and Others; KG v Minister of Home Affairs and Others* (“*EB*”).¹ The respondent objected to the amendment in terms of Rule 28(3). On 22 July 2024, the applicant delivered a second proposed amendment. On 5 August 2024, the respondent objected to the proposed amendment in terms of Rule 28(3). This gave rise to the application for leave to amend in terms of Rule 28(4) that forms the subject matter before me.

Factual Background

[4] The parties are married out of community of property, excluding the accrual system, in terms of a duly registered antenuptial contract. The respondent instituted divorce proceedings on 19 August 2021. The applicant pleaded and delivered a counterclaim on 1 September 2021. The respondent pleaded to the applicant’s counterclaim on 28 September 2021. On 6 June 2024, the applicant delivered a notice of intention to amend her counterclaim in terms of section 7(3)(a) of the Divorce Act, to which the respondent delivered an objection. On 17 September 2024, the parties appeared before court for a judicial case management, which was further postponed to 22 October 2025. The main action has not been set down for trial yet. Pursuant to the respondent’s second objection in terms of Rule 28(3), the applicant launched the current application on 3 October 2024.

[5] The proposed amendment seeks to introduce a redistribution claim under section 7(3) of the Divorce Act, following the Constitutional Court’s judgment in the *EB* case, which declared section 7(3)(a) unconstitutional to the extent that it excluded spouses married out of community of property, excluding accrual, after 1

¹ *EB v ER and Others; KG v Minister of Home Affairs and Others* 2024 (2) SA 1 (CC).

November 1984. Accordingly, this application is premised on the fact that the applicant made substantial direct and indirect contributions to the respondent's estate, which contributions have now formed the basis of the proposed redistribution claim that the applicant intends to pursue. The pleadings in the main divorce action were closed before the delivery of the Constitutional Court's judgment in the *EB* matters.

[6] In opposing the amendment, the respondent raised the following points *in limine*:

- 6.1 That the application is brought out of time.
- 6.2 That the applicant has not made an application for the condonation for the late filing of the application.
- 6.3 That the applicant has filed their heads of argument out of time without the condonation application for the late filing of their heads of argument.

Issues for determination by the court:

[7] The following issues arise for determination by this court:

- 7.1 Whether the applicant's proposed amendment is barred by delay or procedural irregularity as argued by the respondent;
- 7.2 Whether the proposed amendment discloses a triable issue or is expiable as disclosing no cause of action;
- 7.3 Whether the proposed amendment will result in prejudice to the respondent; and
- 7.4 Whether the evolving legal principles set out in *EB* and related jurisprudence provide a competent legal foundation for the relief sought.

First point *in limine*: The condonation requirement

[8] In *Shoprite Checkers (Pty) Ltd v Trustees for The Time Being of The 3 Broten Trust*,² the position regarding the amendment of pleadings is summarised as follows:

[10] The amendment of pleadings and documents is done in terms of Rule 28(1) of the Uniform Rules of Court. The rule permits the amendment of any other pleading and document other than the sworn statements and sets out a process that should unfold to enable the court to consider the amendment application.

[11] It is permissible for the court exercising its discretion and notwithstanding anything to the contrary in the rule, at any stage before the judgment, to grant leave to amend any pleading and document.

[12] It is trite that the onus is on the party seeking the amendment in this case, the plaintiff, to establish that the other party, namely, the defendant will not be prejudiced by it.

[13] The principles governing the granting of an amendment have been summarised by White J in *Commercial Union Assurance Co Ltd v Waymark NO*. These are the following:

- (a) The court has a discretion whether to grant or refuse an amendment;
- (b) An amendment cannot be granted for the mere asking; some explanation must be offered therefore;
- (c) The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue';
- (d) The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the dispute, between the parties;
- (e) The party seeking the amendment must not be *mala fides*;
- (f) The amendment must not cause an injustice to the other side which cannot be compensated by costs;
- (g) The amendment should not be refused simply to punish the applicant for neglect;
- (h) A mere loss of opportunity of gaining time is no reason, in itself, for refusing the application;
- (i) The amendment is not sought timeously; some reason must be given for the delay."

[9] As stated, the general rule is that the amendment will always be allowed unless it is mala fide or unless it will cause an injustice to the other party, which cannot be

² *Shoprite Checkers (Pty) Ltd v Trustees for The Time Being of The 3 Broten Trust* [2023] ZAGPJHC 130.

cured by an appropriate costs order or unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading, which is thought to be amended, was filed. It is also trite that the court is generally inclined to grant an application to amend pleadings to ensure proper ventilation of disputes between parties.

[10] The respondent contends that the applicant should have brought this application within 10 days following the delivery of its objection to the notice of intention to amend, and that the applicant has not adequately explained her failure to do so.

[11] The applicant referred this court to Rule 28(4), which reads as follows:

“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” (My emphasis.)

[12] Counsel on behalf of the applicant argued that the provision of Rule 28(4) is not mandatory; a party may lodge within 10 days an application for leave to amend. Further, the intention to proceed with a formal amendment application was communicated timeously and without prejudice to the respondent. No trial date has been allocated yet since the matter is still subject to active judicial case management. The next case management conference is scheduled for 22 October 2025, which is a year from the date of the filing of the applicant’s founding affidavit.

[13] The court is vested with a wide discretion to condone procedural non-compliance, particularly where the explanation is reasonable, the delay is not excessive, and the interests of justice so demand. In *United Plant Hire (Pty) Ltd v Hills and Others*,³ the court stated as follows:

“It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant

³ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G.

considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice..."

[14] In *Matjabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and others v Compensation Solutions (Pty) Ltd*,⁴ the court considered the interests of justice as paramount in a condonation application where delay as an element of good cause had not been made out, and no prejudice had been suffered by the opposing party. The court further held that in the absence of prejudice, rigid adherence to the rules of court is a catalyst for delay and further costs.

[15] The issue to be adjudicated is of general importance with regard to matrimonial property law. I agree with Counsel for the applicant that the delay in this matter has been explained and that the respondent will not suffer any demonstrable prejudice. Resultantly, this point *in limine* is dismissed.

The second point in *limine*: Whether the proposed amendment discloses a triable issue.

[16] It was argued on behalf of the respondent that the notice of motion does not substantiate the relief that the applicant seeks. The relief sought by the applicant is worded so as to oblige the court to speculate as to what relief the applicant truly seeks and what the applicant seeks to achieve, thereby making it difficult for the court to exercise its discretion.

[17] Counsel for the applicant argued that the notice of motion does disclose the purpose of the application, which is to bring an amendment before the court so that the real issues may be adjudicated fairly, justly and with full regard to the current applicable legal principles. The applicant's reliance on the ante-nuptial contract remains the same. What is sought before this court is the ability to place reliance on

⁴ *Matjabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and others v Compensation Solutions (Pty) Ltd* 2018(1) SA 1 (CC) at 72.

section 7(3) of the Divorce Act. Such relief was not legally competent at the time when pleadings were closed.

[18] It was further argued that the applicant has been bona fide in that it does not seek to withdraw or contradict the admissions already made with regard to the matrimonial property regime.

[19] The notice of motion does disclose a triable issue, which is the division of the joint estate; as a result, the second point *in limine* is dismissed.

[20] It will not be necessary to deal with the third and fourth points in *limine* separately since they are intrinsically part of the main application and will be best addressed during the consideration of the main application.

The applicant's proposed redistribution claim

[21] The proposed amendment seeks to place reliance on section 7(3) of the Divorce Act, read with *EB and RVB v JVB* ("*RVB*"),⁵ as an available remedy to the applicant. The result of the judgment and order in the *EB* case is that the Constitutional Court has now made it possible for a spouse married out of community of property, excluding the accrual system, such as the applicant, to pursue and seek the distribution order as justice so demands. Where contributions of a direct or substantially indirect nature were made to the growth of the other spouse's estate, the entitlement still stands to be proved at trial.

[22] The applicants' contributions to the financial, administrative, and domestic caregiving are detailed in her proposed notice of intention to amend her counterclaim, dated 6 June 2024, as follows:

"4.5 The defendant contributed directly and indirectly to the maintenance and growth of the plaintiff's estate as follows:

4.5.1. utilising her income towards paying the expenses of the family members and the parties household;

⁵ *RVB v JVB* 2025 (4) SA 297 (FB).

4.5.2 by rendering various services which would but for her involvement had to be outsourced at great cost to third parties;

4.5.3 by working at the lodge controlled by the plaintiff for over 18 years in an administrative role thereby contributing her skills and labour to the business;

4.5.4 by being the primary caregiver of the minor children, especially when they were little and resided at the lodge, allowing the defendant to take care of them while also working;

4.5.5 by moving to the family home in Mbombela to be closer to her children's schools and working from home to continue being the primary caregiver in enabling the plaintiff to focus on his work at the lodge;

4.5.6. By taking care of all expenses related to the family home the plaintiff's personal expenses, her own personal expenses and the minor children's expenses using funds from the plaintiff and business account to which he had access;

4.5.7 the income generated from the lodge inter alia permitted the plaintiff to acquire a portfolio of immovable properties either directly or indirectly of considerable value.

4.6 the value of the plaintiff's estate greatly exceeds that of the defendants estate."

[23] 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 events which led up to the second proposed amendment.

Legal Principles

[24] The amendment of pleadings is governed by Rule 28. It is trite that a court hearing an application to amend is clothed with a wide discretion in adjudicating such applications. Rule 28(4) provides that a party may lodge an application for amendment. This is echoed in the wording of Rule 28(10), which provides as follows:

"(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."

[25] 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*,⁶ which states 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 is sought to amend was filed.”

[26] 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. 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. See Erasmus: Superior Court Practice, Volume 2 (2015) D1-332.

[27] In *Transec (Pty) Ltd v Premier of the Province of the Eastern Cape*,⁷ Ebrahim J referred to the following trite principle:

“It has been said in a number of matters that the aim in allowing amendments to pleadings is to do justice between parties by deciding the real issues between them. See: *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 633 (D & CLD). The modern tendency it was said in 1935 already (See: *Rosenburg v Bitcom* 1935 WLD 115) was in favour of an amendment whenever such amendment facilitates the proper ventilation of a dispute between the parties.”

[28] In the proposed amendment, the applicant seeks to place reliance on section 7(3) of the Divorce Act, read with *EB and RVB* as available remedies to her.

⁶ *Moolman v Estate Moolman* 1927 CPD 27 at 29.

⁷ *Transec (Pty) Ltd v Premier of the Province of the Eastern Cape* [1998] ZAECHC 4 para 15.

[29] The result of the judgment and order in *EB* is that the Constitutional Court has now made it possible for a spouse married out of community of property, excluding the accrual system, such as the applicant, to pursue a redistribution order where justice so demands. Granting the amendment will facilitate the proper ventilation of the dispute (divorce action) between the parties.

[30] In the *EB* case, the Constitutional Court ruled on 10 October 2023 that section 7(3)(a) of the Divorce Act is unconstitutional because it restricts redistribution orders to marriages before 1 November 1984. The Court held this limitation violates sections 9 (equality) and 10 (dignity) of the Constitution.

[31] The Constitutional Court ordered a reading in and removal of the discriminatory limitation, and this relief took immediate effect, applying to all pending divorce actions.

[32] The judgment in *RVB*, delivered on 19 November 2024, represents the first High Court interpretation and application of the *EB* ruling within procedural divorce proceedings. In this case, while divorce proceedings were pending at the Regional Court, the defendant, who was married out of community of property without accrual after 1 November 1984, sought to amend her counterclaim to include a redistribution claim under the newly expanded section 7(3). The plaintiff opposed this amendment, arguing, among other points, that the defendant was attempting to retract an admission and incorporate elements into the pleadings not currently recognised in law, as well as seeking legal aid beyond the court's jurisdiction. Ultimately, the Regional Court ruled in favour of the plaintiff and dismissed the defendant's application to amend.

[33] On appeal, the High Court held that the defendant did not seek to withdraw the admission that the parties were married out of community property in terms of the ante-nuptial contract, which excluded equal sharing, but merely sought to introduce a claim for redistribution order on the strength of the orders in *GKR v Minister of Home Affairs and Others*⁸ and *EB*.

⁸ *GKR v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP).

[34] In *Randa v Radopile Projects CC*,⁹ Willis J stated as follows:

“[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.”

Evaluation

[35] I am in agreement with Counsel for the applicant that the matter stands on all fours with the facts presented in the *EP* and *RVB* cases in that the applicant and the respondent were married out of community of property, excluding the accrual system after 1 November 1984. The applicant contends that she made a significant financial and non-financial contribution to the estate of the respondent during the course of the marriage, and she now seeks leave to amend her counterclaim to include reliance on section 7(3) of the Divorce Act in accordance with the *EB* and *RVB* judgments.

[36] Prior to the *EB* judgment, the applicant had no cause of action under section 73 and thus no redistribution claim was pleaded by her. Upon the handing down of the *EB* judgment, the applicant gave timeous notice of her intention to amend in June and July 2024 and subsequently filed this application under Rule 28(4). The matter remains in the case management phase, and it is far from trial readiness. There is no prejudice to the respondent since the applicant’s counterclaim still needs to be proved at trial.

[37] Like the defendant in the *RVB* matter, the applicant does not seek to undo the ante-nuptial contract nor to alter the nature of the matrimonial property regime. The purpose of the amendment is seemingly to invoke an equitable remedy now made available to her through constitutional development.

⁹ *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ).

[38] With regard to the issue of prejudice, it has been demonstrated by the applicant that the respondent has known since June 2024 that the applicant intends to place reliance on section 7(3) of the Divorce Act.

[39] Opposition to an amendment on the basis that the party seeking it is *mala fide* is arguable once an application to amend is brought before a court after the commencement of the trial. A trial date has not been set in this matter. As stated in *Randa (supra)*, the further away the parties are from the commencement of a trial, the easier it should be to obtain an amendment.

[40] In *casu*, the amendment does not alter the nature of the dispute; it only seeks to enable the court to consider a broader range of equitable relief at trial. It does not appear that the applicant is trying to frustrate the finalisation of the main action.

[41] The respondent retains the right to file a plea to the amended counterclaim, adduce evidence in opposition, and cross-examine the applicant at trial. The balance of prejudice strongly favours allowing the amendment.

[42] The amendment sought to be effected by the applicant is not *mala fide*, and the reasons therefor are set out in the Rule 28(4) application.

[43] In fact, the intended amendment is meant to correctly present sufficient evidence and legal jurisprudence that will enable proper ventilation of issues between the parties during trial.

[44] Having regard to all the facts contained in the application, there is no conceivable impediment to the proposed amendment and as such the application stands to be granted.

Costs

[45] The applicant, as the party seeking the amendment, is generally responsible for the costs. Although the applicant seeks to amend her counterclaim, the need for

amendment arose after she filed her original plea and counterclaim; as a result, it cannot be said that the initial counterclaim should have been properly formulated in the first place.

[46] This court also considered the fact that the applicant had to lodge this application in terms of Rule 28(4), due to the respondent's opposition to her notice of intention to amend. The respondent's opposition was premised on form rather than substance.

[47] The abovementioned factors deem it necessary to hold the respondent responsible for the costs incurred by the applicant in this application.

Order

[48] In the result, the following order is made:

- 1 The applicant is granted leave to amend her counterclaim in accordance with the Notice of Intention to Amend dated 22 July 2024.
- 2 The respondent is ordered to pay the costs of the application, including the costs of opposition on a scale as between party and party.

S. M.MSIBI AJ

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

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Date of hearing: 14 August 2025
Date of judgment: 23 September 2025