

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NUMBER: 7891 / 2023

In the matter between:

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

Plaintiff

and

H[...] A[...] M[...]

First Defendant

CARA DOROTHY MASUREIK

Second Defendant

JOOST BERNARDUS VAN LIER

Third Defendant

PAM GOLDING PROPERTIES (PTY) LTD

Fourth Defendant

THOMSON WILKS ATTORNEYS

Fifth Defendant

REGISTRAR OF DEEDS, CAPE TOWN

Sixth Defendant

Summary:

Amendment - Doctrine of Notice - New Claims subject
to Exception - Amendments Refused.

Coram:

Wille, J

Heard: 12 March 2026

Delivered: 20 April 2026

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed application about an amendment. The background and context are sad and unfortunate, but important. The court has tremendous sympathy for the plaintiff. However, I am enjoined to apply the law. This application is wrapped in legality and soaked in finality.¹

[2] The plaintiff seeks the following relief against the defendants: (a) that the sale agreement for certain immovable property by the first defendant to the second and third defendants be declared unlawful and set aside; (b) that the registration of transfer of ownership of this immovable property into the name of the second and third defendants be declared unlawful and set aside, and (c) that the first defendant be declared to be the owner of the property and that the records of the fifth defendant be rectified to reflect the first defendant as the owner of the property. The alleged reasons for the setting aside of these property transactions are five in number. They are:

- (a) that the sale took place in bad faith.
- (b) that the sale is in contravention of public policy.
- (c) that the sale was a fraud perpetrated by the first defendant.

¹ The natural sympathy is with the plaintiff, but the law supports the defendants.

- (d) that the sale infringes on the plaintiff's constitutional rights to housing, and
- (e) that the sale infringes on the plaintiff's constitutional rights to access to court.²

BACKGROUND

THE EXCEPTION

[3] Initially, the plaintiff failed to make out the necessary averments to entitle her to the relief sought, whereupon the second and third defendants filed an exception alleging that her particulars of claim were wanting.³

[4] Following an extensive argument, the exception was upheld. The plaintiff was given leave to amend her claims against the defendants. The plaintiff filed a notice of intention to amend, and the defendants filed a notice of objection. This then led to the current opposed application for an amendment.⁴

[5] In summary, the plaintiff seeks to introduce and formulate a fresh claim relying on the principle of the 'doctrine of notice' to set aside the sale and transfer of the property by the first defendant to the second and third defendants.⁵

[6] In the alternative, it is pleaded that the first defendant had a legal duty not to sell and transfer the property, and the second and third defendants had a legal duty to refrain from purchasing and taking transfer of the property.⁶

[7] Finally, to give legal effect to the plaintiff's claims (as sought by way of the proposed amendments), the plaintiff claims that if the sale and transfer of the property is set aside, the first defendant be interdicted and restrained from again selling the property pending the finalisation of the divorce action instituted by the plaintiff against the first defendant.⁷

² Thus, a constitutional argument is introduced.

³ This was decided by way of a judgment by my former colleague, Allie, J.

⁴ The first, second and third defendants oppose the amendment application.

⁵ The introduction of a fresh claim by way of an amendment is legally permissible.

⁶ This claim is in essence also a fresh or new claim.

⁷ This too, is a fresh or new dependent claim by the plaintiff.

[8] The second and third defendants object to the proposed amendments on the grounds that the amendments sought, if granted, will not disclose a cause of action against the first, second and third defendants.⁸

THE PLAINTIFF AND THE FIRST DEFENDANT

[9] The plaintiff and the first defendant are married out of community of property, with an accrual regime. Their divorce action is still pending. The plaintiff and the first defendant have separate estates. They may contract debts that burden their respective estates, and they may alienate all or any of the assets of their estates, subject to the rule that one spouse may not seriously prejudice the other.⁹

CONSIDERATION

THE ACCRUAL CLAIM

[10] It is trite that in normal circumstances the accrual system only comes into operation at the dissolution of a marriage, either by the death of a spouse or by divorce. Thus, the plaintiff has no vested right in any of the assets, investments or property of the first defendant prior to this strike date.¹⁰

[11] The plaintiff's claim (provided that her accrual proves to be smaller than that of the first defendant) is, in essence, a contingent right to claim half of the accrual in the estate of the first defendant upon the dissolution of their marriage. Pending the dissolution of their marriage, the plaintiff did not (and does not) enjoy a general legal right to prevent the first defendant from selling the property to the second and third defendants.¹¹

[12] The plaintiff has a legal relationship with the first defendant under which she enjoyed a right to occupy the property. This is a *sui generis* right, as she is the spouse of the first defendant, and this *sui generis* right is part and parcel of his

⁸ They say that the particulars of claim will remain subject to a exception.

⁹ Reeder v Softline Ltd and Another 2001 (2) SA 844 (W) at 848 to 849.

¹⁰ There is an exception to this by way of legislation intervention.

¹¹ Reeder v Softline Ltd and Another 2001 (2) SA 844 (W) at 848 to 849.

spousal duty of support towards the plaintiff. This is where the essence of the legal argument in this opposed application for amendment lies.¹²

[13] I say this because, as a matter of pure logic, the plaintiff's rights to reside in the property should ordinarily only come to an end upon divorce (if this is even granted) when she is no longer the spouse of the first defendant.¹³

[14] That having been said, this does not mean that the plaintiff enjoys any proprietary right in the property, and thus, the amendment sought (relying on the doctrine of notice) will not cure the legal *lacuna* in the proposed amendment because no legal cause of action against the first defendant (as pleaded) has been demonstrated.¹⁴

A LEGAL DUTY NOT TO SELL

[15] The plaintiff alleges that the first defendant had a legal duty not to sell and transfer the property pending the outcome of their divorce, and that the second and third defendants had a legal duty to refrain from purchasing and taking transfer of the property. The allegation is that the sale and transfer of the property is thus void.¹⁵

[16] In my view, the legal duty as contended for and relied on by the plaintiff is relevant when determining the unlawfulness of claims founded in our tort law. The remedies that flow from the establishment of such a claim (based on a legal duty) are damages, and, in certain cases, urgent interdictory relief may be granted. In certain cases, an application may be launched for an interdict restraining a person from committing or continuing his or her wrongful conduct. I say this also because it is challenging to understand on what legal basis an order or declaration may be sought declaring the sale of the property in these circumstances void. This is especially so in cases where registration of transfer has taken place. In this case, the property in

¹² Baker v Baker 2021 JDR 0038 (KZD) at para [6].

¹³ But in this case the plaintiff is no longer occupies the former matrimonial home.

¹⁴ This even more so since the second and third defendant have taken transfer of the property.

¹⁵ It is challenging to understand the underlying basis for this alleged legal duty.

question has been transferred to the second and third defendants, and they have legal title and a real right in and to the property.¹⁶

CONSTITUTIONAL ISSUES

[17] The plaintiff also relies on an alleged contravention of her constitutional right of access to the courts.¹⁷

[18] The plaintiff contends that the sale and transfer of the property violate public and legal policy. These arguments are also advanced in support of the legal duty argument.¹⁸

[19] In the judgment dealing with the exception, it was held (rightly or wrongly) that any claim by the plaintiff based on the alleged breaches of her constitutional rights, as well as the allegations that the sale and transfer of the property allegedly violated public and legal policy, was insufficient to disclose a cause of action against the first defendant.¹⁹

[20] I say this because the cause of action now sought to be introduced by way of the proposed amendment is very different. In addition, the facts do not support the plaintiff's case because the plaintiff was not a party to the agreement of sale concluded between the first defendant and the second and third defendants.²⁰

INTERDICTIONARY RELIEF

[21] Finally, the plaintiff seeks to introduce a claim that, if the sale and transfer of the property are set aside, the first defendant also be interdicted and restrained from once again selling the property pending the finalisation of the divorce action instituted by the plaintiff against the first defendant. As a matter of pure logic, the order sought here depends entirely on whether (or not) the plaintiff successfully obtains an order

¹⁶ Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at [63] to [67].

¹⁷ This is presumably in the context of the plaintiff's right to housing.

¹⁸ That what occurred was generally against public policy.

¹⁹ The cause of action in this case was entirely different.

²⁰ Barkhuizen v Napier 2007 (5) SA 323 (CC) at [27] to [30]

that the sale and transfer of the property by the first defendant to the second and third defendant is set aside.²¹

[22] Other than the 'dependency' issues referred to immediately above, again, the facts are not in support of this claim by the plaintiff. I say this because the plaintiff would not, as a matter of course, be entitled to this type of relief, as the first defendant is the owner of the property. Thus, the plaintiff would have to make out a case entitling her to anti-dissipation relief, which would have depended on the prevailing circumstances at the time.²²

PREJUDICE AND INJUSTICE

[23] The primary object of allowing an amendment is to obtain a proper ventilation of the disputes between the parties. This is to determine the real issues between them, so that justice may be done. The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent.²³

[24] The prejudice adjudication involves consideration of a party's rights regarding the subject matter of the litigation. Put another way, where a party would be no worse off if the amendment were granted, there is no prejudice in granting the amendment because the mere loss of the opportunity of gaining time is not an injustice.²⁴

[25] Except in exceptional circumstances, an amendment ought not be allowed where its introduction into the pleadings would render such pleading the subject of a further exception. The proposed amendment must result in a triable issue being introduced into the pleadings.²⁵

²¹ It is a "dependent" claim.

²² RS v MS and Others 2014 (2) SA 511 (GJ) at [16] and [17].

²³ YB v SB 2016 (1) SA 47 (WCC) at [10] and [11].

²⁴ Myers v Abramson 1951 (3) SA 483 (C) at 451 A – B.

²⁵ Barnard v Barnard 2000 (3) SA 741 (C) at [41].

[26] To allow the amendments as sought in this case would render the particulars of the claim (once more) subject to an exception. I say so because there is an inherent defect in the plaintiff's pleadings, as the proposed pleadings do not disclose a cause of action resulting in any triable issue against the first, second and third defendants.²⁶

CONCLUSION

[27] It must be so that an amendment will not be allowed where the granting thereof will not contribute to the determination by the court of the real issues between the parties. Put another way, there is no point in allowing a plaintiff to amend her particulars of claim if her claims will be subject to a successful exception in due course.²⁷

[28] As a matter of pure logic, litigants should be discouraged from instituting actions when they have no cause of action. This must be so, because holding otherwise would mean that the same parties would reappear on the same issues in fresh actions.²⁸

ORDER

[29] For these reasons, I make the following order:

1. The application for leave to amend is refused.
2. The applicant (plaintiff) shall be liable for the costs of an incidental to the application to amend on the scale as between party and party (as taxed or agreed) together with the costs of counsel on Scale B.

E. D. WILLE
(Cape Town)

²⁶ Marney v Watson 1978 (4) SA 140 (C) at 144 F–G.

²⁷ Strydom v Derby-Lewis 1990 (3) SA 96 (T) at 102 C-F.

²⁸ Solomon v Spur Cool Corporation [2002] All SA 359 (C) at 368.