

**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 2024-120870

|              |                                                                                   |
|--------------|-----------------------------------------------------------------------------------|
| (1)          | REPORTABLE: NO                                                                    |
| (2)          | OF INTEREST TO OTHER JUDGES: NO                                                   |
| (3)          | REVISED: NO                                                                       |
| 9 April 2026 |  |
| DATE         | SIGNATURE                                                                         |

In the matter between:

**CLEODORAH PERTUNIA NKOANA**

**APPLICANT**

and

**KARIN VAN NIEKERK N.O.  
(IN HER CAPACITY AS DULY APPOINTED  
EXECUTRIX IN THE ESTATE OF THE LATE  
TSAKANE STANLEY NKOANA)**

**FIRST RESPONDENT**

**KARIN VAN NIEKERK**

**SECOND RESPONDENT**

**MASTER OF THE HIGH COURT, PRETORIA**

**THIRD RESPONDENT**

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**JUDGMENT**

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**HINRICHSSEN AJ**

*Introduction*

- [1] The applicant seeks leave to amend her Notice of Motion in pending motion proceedings. The amendment sought is of a substantive nature and arises from allegations made in the replying affidavit regarding the administration of the estate of the late Tsakane Stanley Nkoana (*"the deceased"*).
- [2] The applicant is the surviving spouse of the deceased, who passed away on the 18th of August 2018. The first respondent is the duly appointed executrix of the deceased estate under Master's reference number 9092/2018. The second respondent is cited in her personal capacity, and the third respondent is the Master of the High Court, Pretoria.
- [3] The proposed amendment seeks to introduce relief which differs materially from that originally sought and which is founded upon allegations appearing for the first time in the replying affidavit.

#### *Background*

- [4] On 22 October 2024 the applicant instituted motion proceedings seeking an order compelling the respondents to produce certain documents relating to the administration of the deceased estate. These included supporting vouchers relating to the liquidation and distribution account as well as bank statements relating to the estate account.
- [5] The respondents delivered an answering affidavit on the 26<sup>th</sup> of November 2024. Attached to that affidavit were copies of the late estate bank statements which had been requested by the applicant.
- [6] Following the receipt of those documents the applicant delivered a replying affidavit in which she raised several allegations concerning the administration of the estate. Among other things, the applicant alleged that the executrix had paid herself executrix fees in the amount of R1,144,653.49 and that certain financial irregularities had occurred in relation to property transactions administered during the course of the estate administration.

- [7] Based on these allegations the applicant introduced additional relief in the replying affidavit. The applicant now sought orders directing the second respondent personally to repay certain sums of money to the estate and further sought an order removing the first respondent as executrix.
- [8] The respondents objected to this course and delivered a notice in terms of Rule 30 of the Uniform Rules of Court alleging that the replying affidavit constituted an irregular step. The applicant thereafter delivered a notice of intention to amend the Notice of Motion to incorporate the new relief foreshadowed in the replying affidavit.
- [9] The respondents objected to the proposed amendment. The present application arises from that objection.

*The issues for determination*

- [10] The central question in this application is whether the applicant should be granted leave to amend the Notice of Motion in the main application in circumstances where the factual basis for the new relief appears for the first time in the replying affidavit.
- [11] Closely related to that question is whether the introduction of additional allegations and relief in reply can be condoned, and whether the amendment sought would constitute a permissible development of the existing case or an impermissible attempt to introduce an entirely new cause of action.

*Applicable law*

- [12] Amendments to pleadings and documents in civil proceedings are governed by Uniform Rule 28. The rule reflects the principle that amendments should generally be allowed to ensure that the real issues between the parties are properly ventilated.

[13] The general approach to be adopted in applications for amendment has been set out in numerous cases. The practical rule is that an amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. The following statement by Watermeyer J in *Moolman v Estate Moolman*<sup>1</sup> has frequently been relied upon:

“[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.”

[14] It is trite law that a court is vested with a discretion as to whether to grant or refuse an amendment. The discretion to allow amendments is, however, not unfettered. An amendment may properly be refused where it introduces a new cause of action at a late stage of proceedings<sup>2</sup>.

[15] In motion proceedings the procedural framework is governed by Uniform Rule 6. It is well established that the founding affidavits serve both as the pleading and the evidence upon which the applicant relies. The answering affidavit responds to the allegations contained in the founding affidavit, and the replying affidavit is confined to replying to matters raised in the answering affidavit.

[16] It follows that, as a general rule, an applicant must make out his or her case in the founding affidavit and may not introduce a new cause of action in reply<sup>3</sup>.

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<sup>1</sup> 1927 CPD 27 at 29.

<sup>2</sup> *Bestenbier v Goodwood Municipality* 1955 (2) SA 692 (C)

<sup>3</sup> *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T); *Kwinana v Ngonyama* (unreported, SCA case no 103/2021 dated 8 April 2022) at paragraph [12].

[17] The difficulties which arise when litigants seek to introduce a new cause of action through an amendment of the Notice of Motion were considered in *Bestenbier*<sup>4</sup>.

[18] In that matter the applicant sought to amend the Notice of Motion by adding a new prayer based upon allegations materially different from those originally relied upon. The Court recognised that a Court possesses a discretion to allow amendments in motion proceedings.

[19] However, the Court emphasised that where an amendment introduces a new cause of action based upon materially different allegations that discretion must be exercised with caution. In refusing the amendment the Court observed:

“If the applicant is left to launch a fresh motion, fresh costs will no doubt be incurred, but in such other proceedings the issues will be properly formulated and be supported by the necessary facts which will then enable the respondent to deal fully with the allegations.”<sup>5</sup>

#### *The applicants argument*

[20] In her heads of argument and during argument of the matter Adv Louw, for the applicant, submitted that the facts in *Mamlambo Construction (Pty) Ltd v Amathole District Municipality*<sup>6</sup> are materially similar to the matter *in casu* and that a similar conclusion must follow.

[21] The applicant in *Mamlambo* was constrained by a lack of information due to the respondent’s failure to provide the tender record, despite repeated attempts to obtain it. This constraint directly informed the court’s willingness to relax the orthodox rule against making out a case in reply. The court exercised its discretion to admit new matter in the replying affidavit precisely because the

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<sup>4</sup> Fn 2.

<sup>5</sup> Page 698 C to D.

<sup>6</sup> 2020 JDR 1219 (ECGEL).

applicant could not reasonably have included that material in the founding affidavit.

- [22] The key doctrinal principle reaffirmed in *Mamlambo* remains orthodox: an applicant must, as a general rule, make out its case in the founding affidavit. The deviation from this rule was expressly framed as non-immutable and fact-specific, driven by absence of prejudice and the applicant's inability to access critical information earlier.
- [23] From a comparative analysis perspective, the applicant appears to be attempting to leverage *Mamlambo* as a blanket authority for introducing a new case in reply. That is a mischaracterisation. *Mamlambo* does not create a general licence to supplement or reformulate relief in reply; it recognises a narrow, discretionary exception where (i) the new matter was not available at the time of launching proceedings, and (ii) the opposing party will not suffer prejudice.
- [24] There is a distinction however that materially weakens the applicant's reliance on *Mamlambo*. In that case, the nature of the relief remained consistent—the applicant sought interim interdictory relief pending review, and the additional material in reply merely bolstered the *prima facie* right underpinning that relief.
- [25] The court in *Mamlambo* was not confronted with a situation where the applicant sought to alter the character of the relief itself, as is the case in this matter. In the present matter, the original relief was a procedural order directed at transparency — the production of documents and supporting vouchers. The amended relief, by contrast, seeks orders of a fundamentally different character: the repayment of over R1.8 million and the removal of the executrix from office. The shift from disclosure to personal liability is not a development of the existing case; it is the introduction of a new one.

## *Analysis*

- [26] Against the legal framework set out above, the facts of this matter fall to be considered.
- [27] A replying affidavit is intended to answer matters raised in the answering affidavit and not to introduce a new cause of action or new relief. Courts have consistently held that an applicant stands or falls by the case made out in the founding papers and cannot remedy deficiencies in those papers by raising new matter in reply.
- [28] In the present matter the original application was directed primarily at obtaining the disclosure of documents relating to the administration of the estate. The founding affidavit in that application was therefore framed around the need for transparency and the production of financial records and supporting vouchers. The relief in the Notice of Motion corresponded with that objective.
- [29] However, once the respondent delivered their answering affidavit and attached certain bank statements, the applicant alleges that those documents revealed irregularities in the administration of the estate. On the strength of those alleged irregularities, the applicant then introduced in the replying affidavit allegations concerning the payment of the executrix's remuneration and alleged discrepancies in estate transactions. The applicant then sought different relief including the repayment of certain monies and the removal of the executrix.
- [30] The difficulty that arises is that the factual foundation for this additional relief does not appear in the founding affidavit of the main application. It appears only in the replying affidavit. The applicant seeks to regularise this position by amending the Notice of Motion and by seeking condonation for the introduction of the new allegations in the reply. However, the amendment of a Notice of Motion cannot cure the absence of a proper factual foundation in the founding affidavit. Where the substantive case for the relief arises only in the reply, the

amendment does not resolve the underlying difficulty that the applicant's case has not been made out in the founding papers.

- [31] The applicant argues that the new allegations were introduced in reply because the relevant facts only became apparent once the respondent disclosed the bank statements in their answering affidavit. It may well be that the applicant only became aware of the alleged irregularities at that stage. However, the fact that the new information emerged during the course of litigation does not necessarily entitle a litigant to build an entirely new case in reply.
- [32] The applicant goes further, however, and contends that the respondent deliberately withheld the estate bank statements from her and her attorneys prior to the institution of the main application, and that the respondent only disclosed them when compelled to annex them to the answering affidavit. It is not disputed on the papers that the applicant's attorneys repeatedly requested the bank statements and that the respondent consistently failed to provide them. The applicant submits that a litigant who deliberately conceals information which gives rise to a new cause of action, and who then raises procedural objections when that information finally comes to light, should not benefit from the procedural framework she herself has frustrated.
- [33] While the respondent's conduct may properly attract censure, it does not relieve the applicant of the obligation to pursue the appropriate procedural course once the new facts came to her knowledge. The question is not whether the respondent's conduct was deserving of criticism — it plainly was — but whether the procedural vehicle chosen by the applicant is the appropriate one. As I explain below, I am not persuaded that it is, notwithstanding the respondent's conduct. The applicant had other procedural options available to her which would have achieved the same result without the difficulties that attend the present application.
- [34] As I have already observed in distinguishing *Mamlambo*, the additional relief sought is materially different in character from the relief originally sought. These forms of relief are not merely incidental to the original application; they present

a significant expansion of the scope of the proceedings and introduce allegations of misconduct in the administration of the estate.

- [35] The respondents contend that the amendment fundamentally alters the nature of the proceedings and that the applicant has effectively attempted to introduce a new cause of action in the replying affidavit. There is merit in that contention. The relief now sought by the applicant is based on allegations that were not foreshadowed in the founding affidavit and that the respondents have not yet had the opportunity to answer in a structured set of answering papers.
- [36] The applicant suggests that any prejudice to the respondent can be cured by permitting the respondents to file further affidavits dealing with the additional allegations. While courts may in appropriate circumstances allow the filing of further affidavits, such a course should not be used to undermine the ordinary structure of motion proceedings. The normal sequence of affidavits - founding, answering and replying - exists to ensure procedural fairness and clarity in the presentation of cases. Allowing a litigant to introduce a new case in reply and then restructure the affidavit sequence may in certain circumstances create uncertainty and procedural complexity.
- [37] Furthermore, the nature of the allegations introduced by the applicant is such that they may give rise to disputes of fact concerning the administration of the estate and the handling of estate funds. Allegations relating to the alleged misapplication of estate funds, the propriety of the executrix's remuneration, and the calculation of amounts received and paid in estate transactions are matters that may require detailed factual enquiry. These are not issues that arise naturally from the original disclosure application but rather from a new and more expansive challenge to the administration of the estate.
- [38] In these circumstances, I must consider whether the interests of justice would be better served by allowing the applicant to pursue those allegations in properly structured proceedings rather than by reshaping the existing application through an amendment.

- [39] The applicant was not without procedural options once the alleged irregularities came to light. When newly discovered facts give rise to a materially different claim or substantially different relief, the proper procedural course is ordinarily to seek leave to file a supplementary founding affidavit or to institute fresh proceedings. The applicant could have pursued either course. Either approach would have ensured that the factual basis for the new relief was properly set out in the founding papers and that the respondents had a fair opportunity to answer the allegations in accordance with the established structure of motion proceedings.
- [40] It must also be remembered that despite the allegations of the maladministration of the estate and the misapplication of estate funds, the third respondent had approved the Liquidation and Distribution account. The third respondent may also want to enter the fray and have his/her say.
- [41] On the applicant's proposed relief, two additional affidavits will be filed in these proceedings, bringing the total to five. Should the third respondent also enter the dispute — which, given the nature of the allegations, is not improbable — a further set of affidavits may follow. The proceedings could ultimately consist of as many as eight affidavits. That degree of procedural complexity is inconsistent with the orderly resolution of what was originally a straightforward disclosure application.
- [42] In light of these considerations, I am not persuaded that the amendment sought by the applicant constitutes a permissible development of the existing proceedings. Rather, the amendment seeks to transform an application that was originally directed at obtaining documentation into an application seeking substantive relief based on allegations that appear for the first time in the replying affidavit.
- [43] In the absence of a proper factual foundation for that relief in the founding affidavit, the amendment of the Notice of Motion cannot cure the procedural difficulties that arise.

[44] For the same reasons, I am not persuaded that condonation should be granted for the introduction of the novel allegations in the replying affidavit. The applicant has advanced a credible explanation for the late introduction of the new material — the facts upon which the allegations rest were not available to her until the answering affidavit was delivered. I accept that explanation. However, the remedy for the situation in which the applicant finds herself is not condonation of a procedurally irregular step, but the institution of proceedings in which the factual foundation for the relief sought is properly set out from the outset. The dismissal of the application for leave to amend necessarily entails the refusal of condonation, as the two stand and fall together.

[45] I therefore conclude that the applicant's attempt to introduce the additional relief by way of amendment is not procedurally appropriate. The applicant remains free, if so advised, to institute fresh proceedings in which the allegations concerning the administration of the estate and the relief sought are properly set out in the founding papers.

[46] In these circumstances the amendment cannot be permitted.

### Costs

[47] The respondents seek the dismissal of the application with costs on an attorney and client scale.

[48] A court makes an order on an attorney and client scale to mark its disapproval of the conduct of the losing party. In *Public Protector vs South African Reserve Bank*<sup>7</sup> the majority of the Constitutional Court, with reference to *Orr v Schoeman*<sup>8</sup> stated<sup>9</sup>

“More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a Court wishes to mark its

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<sup>7</sup> 2019 (6) SA 253 (CC)

<sup>8</sup> 1907 TS 281

<sup>9</sup> At 318C to 319A

disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, Courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *male fide* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of process of court.”

[49] The terminology thus suggests that an award of attorney and client costs is a form of punishment. However, in *Nel v Waterberg Landbouers Kooperatiewe Vereeniging*<sup>10</sup> the Court emphasised that punishment alone does not supply a complete explanation of the grounds on which the practice rests. Something more underlies it.

[50] The Court explained that the true explanation of an award of costs on an attorney and client scale is as follows:

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectively than it can by doing by means of a judgement for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation”.

[51] In declining to award costs on an attorney and client scale, I have taken into account that the applicant’s conduct, while procedurally irregular, was not vexatious or an abuse of process. The applicant was confronted with information she viewed as suggesting serious irregularities in the administration of the estate and she sought to address those irregularities within the existing proceedings. Her approach, though procedurally flawed, was not unreasonable in the circumstances.

[52] In the circumstances I make the following order:

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<sup>10</sup> 1946 AD 597 at 607

- a. The application is dismissed.
- b. The applicant is to pay the costs of this application on a party and party scale, Scale C.

  
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**DH HINRICHSEN**  
**ACTING JUDGE OF THE HIGH COURT**  
**PRETORIA**

**DATE OF THE HEARING: 16 MARCH 2026**

**DATE OF HANDING DOWN JUDGMENT: 9 APRIL 2026**

Appearances:

For the Applicant:

Adv NG Louw instructed by Albert  
Hibbert Attorneys

For the Respondents:

Adv PJ Greyling instructed by Clarke  
& Van Eck Attorneys