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

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

DATE SIGNATURE

CASE NO: 15202/2020

In the matter between:

K[…], K[…] A[…] Applicant
(Plaintiff in the main action)

and

K[…], N[…] P[…] (born T[…]) Respondent
(Defendant in the main action)

JUDGMENT

LANGE AJ:

INTRODUCTION

[1] This is an interlocutory application in terms of Rule 28 of the Uniform Rules of Court in which the applicant seeks leave to amend his particulars of claim in a pending divorce action. The applicant wishes to change his pleaded case from one seeking shared residence of the minor child to one seeking primary residence, and in addition seeks to introduce a new paragraph 7 containing

factual allegations in support of that claim. The respondent opposes the amendment on four grounds. Having considered the papers and the heads of argument filed by both parties, I am satisfied that the application ought to be granted. These are my reasons.

BACKGROUND

[2] The parties are married to each other. There is one minor child born of the marriage, P[…], born on 13 December 2016. The parties separated in November 2019. The respondent vacated the former matrimonial home with the minor child on 18 March 2020 and has since resided with her parents and brother.

[3] The applicant instituted divorce proceedings on 1 July 2020 under case number 15202/2020. In his original particulars of claim, the applicant sought a shared residency arrangement in respect of the minor child. The respondent filed a plea and counterclaim in which she sought primary residence of the minor child, with contact rights of the applicant to be determined following the completion of a SAPS investigation into alleged sexual interference with the minor child alleged to have occurred on 7 March 2020. The applicant filed a plea to the counterclaim. Pleadings have accordingly closed. The proceedings are in pre-trial phase of a litigation, but the matter is not trial ready.

[4] The litigation history between the parties has been tortured and protracted. In July 2020, the applicant launched a Rule 43 application and an order for supervised contact was granted by Justice Crutchfield on 10 September 2020.

[5] In July 2022, the investigating officer in the SAPS investigation informed the applicant's attorney that the applicant was no longer a person of interest. On

30 May 2023, the investigating officer confirmed that the State had declined to prosecute on the basis that there was no reasonable prospect of a successful prosecution. The respondent was aware of this decision but failed to disclose it.

[6] Thereafter the applicant brought an application in terms of Rule 43(6) to vary Justice Crutchfield's order. That application was argued on 7 September 2023 before Acting Justice Bezuidenhout and judgment was uploaded on 16 January 2024. Contact provisions were implemented pursuant to that order. An urgent application by the respondent to stay execution of Acting Justice Bezuidenhout's order was dismissed by Acting Justice Hardy.

[7] The respondent subsequently brought an application to set aside the orders and judgments of Acting Justices Bezuidenhout and Hardy. That application was dismissed by Acting Justice Von Ludwig, as was a further Rule 43(6) application by the respondent for a contribution towards costs. An application to compel the respondent to make discovery was granted on 18 March 2025. Leave to appeal in respect of all these applications was similarly dismissed by Acting Justice Von Ludwig on 21 November 2025.

[8] The applicant points out that all of the orders being appealed by the respondent are interlocutory in nature and are not definitive of proceedings and they did not have the effect of disposing of at least a substantial portion of the relief claimed in the pending divorce action between the parties. In other words, the trial court is still being called upon to adjudicate the questions of residency, contact and maintenance of the minor child.

[9] On 9 October 2025, the applicant delivered a Rule 28 notice to amend his particulars of claim. On 20 October 2025, the respondent objected on four principal grounds. The applicant then brought this application for leave to amend.

THE PROPOSED AMENDMENT

[10] The proposed amendment relates to the question of primary residence of the minor child and her best interests. It seeks to replace the original claim for shared residence with a claim for primary residence, and to introduce a new paragraph 7 setting out the factual basis for that claim. The grounds advanced in support of primary residence include, in summary: the strong bond between the applicant and the minor child; the respondent's alleged conduct in frustrating contact and making unfounded allegations; the hostile attitude of the respondent and her parents toward the applicant; the respondent's alleged alienating behaviour; her alleged failure to furnish the applicant with information concerning the minor child; her alleged refusal to permit the minor child's paternal grandparents contact; her alleged misrepresentation of information to third parties; and her alleged obstructive, dilatory and vexatious conduct in the litigation. The amendment also seeks to adjust related relief including contact and maintenance provisions, with reference to an expert's recommendations.

THE LEGAL FRAMEWORK

[11] The applicable legal principles governing applications for leave to amend are well-established and uncontentious between the parties. Both rely substantially on the same body of authority.

[12] The starting point remains *Moolman v Estate Moolman*[1], which enunciates the foundational principle:

a. *"[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."*

[13] This principle was adopted and confirmed by the Constitutional Court in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2] at paragraph 89, where it was held that Rule 28 is "an enabling rule" and that amendments should generally be allowed unless there is good cause for not allowing them.

[14] The applicant referred to the matter of *Media 24 (Pty) Ltd v Nhleko and Another*[3], where the SCA dealt with an appeal against the dismissal of an application to amend a plea. The court stated the following at paragraph 16:

a. *"In coming to its conclusion to refuse the application for amendment, the high court paid scant regard to the purpose of pleadings, which is to define the issues between the parties. Because the primary role of pleadings is to ensure that the real dispute between litigants is*

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[1] 1927 CPD 27 at 29
[2] 2020 (1) SA 327 (CC)
[3] (109/22) [2023] ZASCA 77 (29 May 2023)

> *adjudicated upon, courts are loathe to deny parties the right to amend their pleadings, sometimes right up until judgment is granted. An exception is made when the amendment is mala fides or will result in an injustice which cannot be cured by a costs order. Thus, the power of a court to refuse amendments is confined to considerations of prejudice or injustice to the opponent."*

[15] At paragraph 18 of *Media 24*, the SCA further clarified:

a. *"It is not for the courts to impose their views as to the true nature of the case. It is the pleadings, and the pleadings alone, that define and determine the issues upon which the court will adjudicate… it is the facta probanda that must be pleaded, not the facta probantia. A litigant is not required to prove its case in the pleadings, nor to describe the evidence to be led, but to state the material facts on which it relies and which it intends to prove at the trial."*

[16] The importance of allowing amendments to secure proper ventilation of disputes was confirmed in *Nedbank Limited v RVI Consulting CC and Another*[4], where the court emphasised that amendments ought to be granted where a refusal would defeat the objective of ensuring that the real dispute between litigants is adjudicated upon. The court in that matter, following *Randa v Radopile Projects* [5]and *Rosenberg v Bitcom*[6], confirmed that the modern tendency of the courts lies in favour of amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.

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[4] (2015/24887) [2020] ZAGPJHC 263
[5] *CC* 2012 (6) SA 128 (GSJ)
[6] 1935 WLD 115

[17] A further point of importance in this matter flows from the subject matter of the proposed amendment. The amendment concerns the primary residence of a minor child. Section 28 of the Constitution of the Republic of South Africa, 1996 provides that a child's best interests are of paramount importance in every matter concerning the child. Section 9 of the Children's Act 38 of 2005 gives legislative expression to the same principle. The court considering an amendment application of this nature cannot be entirely indifferent to the fact that the proposed amendment directly serves the purpose of placing before the trial court a complete factual foundation upon which it can adjudicate the child's best interests with the benefit of all relevant allegations. The amendment application court does not, of course, adjudicate the merits of the child's best interests; that remains the sole province of the trial court but the constitutional and statutory imperative that the best interests of the child must be served in every matter concerning the child is a relevant consideration when the court exercises its discretion.

[18] In this matter the amendment application was brought after the close of pleadings but prior to discovery. The Constitutional Court in *Apex Truck & Trailer v PPCF Boerdery* [7]at paragraph 1 recognised that in such circumstances the matter is far from trial-ready, which is a relevant consideration in assessing prejudice.

[19] Against this framework, I turn to consider each of the four grounds of objection raised by the respondent.

<u>FIRST GROUND OF OBJECTION: PREJUDICE FLOWING FROM PENDING APPEALS</u>

[7] *CC* (21/37786) [2024] ZAGPJHC 489 (10 May 2024)

[20] The respondent's first ground is that the proposed amendment is prejudicial by reason of the sub judice pendency of appeals arising from the various interlocutory applications. At the time the founding affidavit was deposed to, there were five applications for leave to appeal pending before Acting Justice Von Ludwig, all relating to interlocutory orders.

[21] This ground fails for several reasons:

a. First, it is necessary to understand precisely what interlocutory orders are in issue and what the proposed amendment is about. As the applicant correctly points out, all five pending applications for leave to appeal concern interlocutory matters: specifically, the set-aside application, the discovery application, and the contribution towards costs application. None of these orders concerns the question of primary residence of the minor child, which is the substance of the proposed amendment. These interlocutory orders are "purely interlocutory in nature" in the sense confirmed by the Supreme Court of Appeal in [8]at paragraph 16 — they have no final effect, are not definitive of the proceedings, and do not dispose of at least a substantial portion of the relief claimed in the pending divorce action. The trial court remains fully seized with the determination of residency, contact and maintenance of the minor child.

b. Second, the respondent's argument, as developed in her heads of argument and in her address to this court, conflates two distinct things. She argues that the extant interlocutory orders form part of the "operative forensic landscape" and will "colour the trial court's

[8] *HJ v PJ* 2024 JDR 1665 (SCA)

evaluation of parental fitness and the child's best interests." That may be so, but it is a submission addressed to the trial court's conduct of proceedings, not to whether this amendment should be permitted. An objection to a proposed amendment on the grounds that interlocutory orders may influence the trial court is not a proper basis for refusing an amendment. The amendment does not seek to reopen or challenge any of those interlocutory orders. It seeks to place before the trial court a revised pleaded case regarding primary residence.

c. Third, the respondent's reliance on *Oudekraal Estates (Pty) Ltd v City of Cape Town* [9] for the proposition that an extant court order stands until set aside is not in dispute. But that principle does not advance the respondent's case here. The applicant is not seeking, through this amendment, to set aside any interlocutory order. He is merely seeking to amend his pleadings to reflect his current case regarding primary residence. The existence of interlocutory orders that remain extant is simply irrelevant to whether he should be permitted to amend his particulars of claim.

d. Fourth, the respondent submits that allowing the amendment risks making the appellate process "partially academic" and could create "inconsistent or unfair outcomes." This submission is too vague and speculative to constitute a sustainable basis for refusing an amendment. The respondent does not identify with any specificity how the amendment would render any particular appellate process academic or how any particular inconsistency would arise. The

[9] 2004 (6) SA 222 (SCA)

interlocutory appeals concern procedural and case-management issues; the proposed amendment concerns substantive pleaded relief regarding primary residence. They operate on different planes.

e. Fifth, and most fundamentally, the respondent's submission amounts to this: the amendment should be refused because the interlocutory procedural history is complicated and ongoing. That is not a ground that is cognisable under the *Moolman* test. The test asks whether the amendment is *mala fide* or whether it would cause prejudice or injustice not compensable by costs. The pendency of interlocutory appeals does not make the amendment *mala fide*, nor does it of itself constitute the kind of incurable prejudice or injustice that would justify refusal.

[22] This ground of objection is dismissed.

SECOND GROUND OF OBJECTION: SCANDALOUS, VEXATIOUS AND INSUFFICIENTLY PARTICULARISED NEW MATTER

[23] The respondent's second ground is that the new allegations introduced in proposed paragraph 7 are scandalous, vexatious, irrelevant, insufficiently particularised, and will change the character of the trial while rendering the particulars of claim vague and embarrassing.

[24] This ground also fails for the reasons set out hereinbelow. I will deal with each objection individually.

[25] **Scandalous and vexatious**

a. An allegation in a pleading is scandalous or vexatious if it has no legitimate bearing on the issue to be adjudicated and its inclusion is calculated to prejudice or embarrass the opposing party. The proper remedy for scandalous or vexatious matter in a pleading is an application to strike out under Rule 23(2). The respondent has not brought a standalone striking-out application in the required form. More significantly, even if the court were to consider this issue in the present context, the respondent has not demonstrated that any of the proposed allegations are without legitimate bearing on the issues before the trial court.

b. The trial court will be required to determine, as a matter of paramount importance, what arrangement concerning primary residence, contact and maintenance is in the best interests of the minor child. For that determination, the trial court will need to consider the conduct of both parents in relation to the minor child, the history of the parties' interactions, the ability of each parent to foster a healthy relationship between the child and the other parent, and all other relevant factors. The allegations in proposed paragraph 7 — that the respondent has frustrated contact, engaged in alienating behaviour, failed to keep the applicant informed, and has conducted litigation in an obstructive manner — are all squarely relevant to the primary-residence dispute and to the best-interests enquiry. They are not scandalous in any legally recognised sense.

c. The respondent's answering affidavit disputes these allegations substantively. That is entirely appropriate and that dispute will be

resolved at trial. The fact that allegations are disputed, even vigorously disputed, does not make them scandalous or vexatious within the meaning of Rule 23. As the applicant correctly observes by reference to *VAATZ v Law Society of Namibia* [10]for a striking-out application to succeed it is not enough that the matter be scandalous, vexatious or irrelevant; the applicant must also demonstrate that she would be prejudiced if the application were not granted. In the *VAATZ* matter it was held that "prejudice" for this purpose **"**did not mean that if the offending allegations remained that the innocent party's chances of success would be reduced: it was substantially less than that so that if a party was required to deal with the scandalous, vexatious or irrelevant matter in motion proceedings the main issue could be side-tracked but if those allegations remained unanswered the innocent party might well be defamed, the retention of such matter would be prejudicial."[11] No such prejudice in the *VAATZ* sense has been demonstrated.

d. The respondent's own heads describe the proposed allegations as "broad evaluative accusations, many of them conclusory, some duplicative." That characterisation, even if accepted, does not of itself render the proposed allegations scandalous or vexatious in a legal sense. Parties regularly plead matters in summary form, with the detail to be developed through discovery and evidence at trial. The characterisation of allegations as "evaluative" or "conclusory" goes to the form of the pleading, which is more properly addressed under the vague-and-embarrassing analysis below.

[10] 1991 (3) SA 563 (NM),
[11] *Ibid paragraph* 335F-H

[26] **Vague and embarrassing**

a. The test for whether a pleading is vague and embarrassing has been conveniently summarised in the commentary in Erasmus, *Superior Court Practice* at RS 22, 2023, D1 Rule 23-1 to D1 Rule 23-28 as follows: a statement is vague if it is meaningless or capable of more than one meaning, such that the reader cannot distil from it a clear, single meaning; if vagueness is established, the court must assess the embarrassment caused; the ultimate question is whether the excipient suffers prejudice; the onus is on the excipient to demonstrate both vagueness amounting to embarrassment and embarrassment amounting to prejudice; and the excipient must establish embarrassment by reference to the pleadings alone.

b. The respondent cannot, as she does in her answering affidavit, engage with the merits of each sub-allegation and at the same time contend that those allegations are so vague that she does not know the case she must meet. The two positions are logically irreconcilable. A respondent who can engage forensically and in detail with allegations plainly understands what those allegations mean and what case she is required to meet.

c. Rule 18(4) of the Uniform Rules of Court requires that every pleading contain a clear and concise statement of the material facts upon which the pleader relies, with sufficient particularity to enable the opposite party to reply thereto. As confirmed in *Molusi and Others v Voges*[12] at paragraph 28 and reaffirmed in *MJK and Others v IIK*[13], the purpose of pleadings is

[12] 2016 (3) SA 370 (CC)
[13] 2023 (2) SA 158 (SCA)

to define the issues for the parties and the court. A litigant is required to plead the *facta probanda*, the material facts, and not the *facta probantia*, the evidence. The applicant is not required to prove his case in the pleadings or to set out the evidence he intends to lead. He is required to state the material facts upon which he relies.

d. Examined against that standard, the proposed paragraph 7 contains allegations that are clear and sufficiently particular. Each sub-allegation identifies a specific type of conduct attributed to the respondent. Whether that conduct occurred and what weight it should bear in the best-interests analysis are questions for the trial court. The respondent may plead to each allegation. This is exactly what pleadings are designed to do.

e. The respondent's submission that the amendment would "change the character of the trial" is not, on its own, a valid ground for objection. Amendments frequently change the scope and character of a trial. That is often precisely their purpose: to ensure that the real dispute between the parties is adjudicated. The question is not whether the amendment changes the character of the trial but whether it does so in a manner that causes the respondent irremediable prejudice. I deal with prejudice in the context of the fourth ground below.

f. This second ground of objection is accordingly dismissed.

<u>THIRD GROUND OF OBJECTION: ABSENCE OF BONA FIDE CHANGED CIRCUMSTANCES AND ULTERIOR PURPOSE</u>

[27] The respondent's third ground is that there has been no bona fide change in circumstances and that the amendment is actuated by an ulterior purpose.

She contends that the applicant's stated reason for the amendment, that his "views in regard to primary residence have changed", is not a change in circumstances but merely a changed preference, and that the amendment is a tactical manoeuvre rather than a genuinely motivated change of position.

[28] This ground also fails for the following reasons:

a. It is necessary first to clarify what "good faith" requires in the context of an amendment application. The *Moolman* test asks whether the application is *mala fide*. The question is not whether the applicant has been presented with a single dramatic new event that could be identified as the specific juridical trigger for the change in position. The question is whether the application is brought in bad faith that is, for an improper purpose unrelated to the legitimate pursuit of the party's rights.

b. The applicant's case, set out in the founding affidavit and in the proposed amendment itself, is that since the institution of divorce proceedings in July 2020, the conduct of the respondent and the circumstances concerning the minor child have changed materially in a number of respects. These include the respondent's persistent obstruction of his contact with the minor child; the unfolding of and subsequent decision not to prosecute in the SAPS investigation; the respondent's multiple failed interlocutory applications; her failure and refusal to make discovery; her failure to comply with the orders of Acting Justice Bezuidenhout regarding the appointment of an expert; her alleged alienating behaviour; and the passage of time during which the factual landscape has evolved considerably. Taking all of these matters into account, the applicant has arrived at the view, which he is entitled to

hold and which a court of law cannot gainsay at this stage, that primary residence of the minor child should vest with him.

c. The respondent's submission that this amounts merely to a "changed preference" rather than changed circumstances mischaracterises the nature of the applicant's case. A parent who observes, over a period of five years of contested litigation, what he genuinely regards as a sustained pattern of conduct by the primary caregiver that is detrimental to the minor child, who notes the failure of the police investigation, who experiences resistance to his parental rights at every turn, and who forms the view that primary residence should be with him, is not articulating a mere preference. He is articulating a considered response to a substantially changed factual landscape. Whether that assessment is correct is a matter for the trial court.

d. It is further relevant that the applicant has specifically invoked the best interests of the minor child as the central justification for the amendment. That is not, as the respondent suggests, a rhetorical device designed to evade scrutiny. It is the correct legal framework for the proposed amendment. In all matters concerning children, the court must be satisfied that the best interests of the child are served. An applicant who frames a change in pleaded position by reference to what he genuinely believes to serve the child's best interests is acting in good faith, not bad faith, even if the respondent disputes the merits of that position.

e. The respondent also raises what she terms the "speculative expert problem." She points to the fact that the proposed amendment includes a reference to the "recommendations of an expert" when no such expert

recommendation existed at the time of the amendment. The proposed amendment is framed prospectively; it seeks to ensure that the trial court will have the benefit of an expert assessment when it adjudicates the question of primary residence. The reference to expert recommendations is anticipatory and does not render the amendment mala fide. It is precisely because the applicant wishes to ensure that the matter is properly ventilated before the trial court, including through expert evidence, that the amendment is sought. The fact that the expert process has been obstructed by the respondent, as alleged by the applicant, and has not yet been completed, does not undermine the good faith of the amendment.

f. The respondent's further point that the Family Advocate has already produced a report dated 17 March 2025 and that the applicant has not engaged with why that report does not support his primary-residence case is a matter going to the merits of the primary-residence claim. It is not a basis for refusing the amendment. The trial court will assess the Family Advocate's report in the context of all the evidence. It is not for this court, on an amendment application, to weigh the Family Advocate's report against the applicant's proposed case and adjudicate the merits in favour of the respondent.

g. The respondent submits that the absence of a "cleanly identifiable, genuinely new fact" as the "juridical trigger" for the amendment is indicative of bad faith. That submission is rejected. The *Moolman* test does not require that an amendment be triggered by a single identifiable event. An amendment may be entirely justified by the cumulative evolution

of circumstances over time. Where, as here, the circumstances have evolved materially over a period of years, a party's assessment of where the best-interests balance lies may legitimately change, and that change may justify an amendment.

h. I find no basis for concluding that this amendment is actuated by *mala fides*. On the contrary, the papers demonstrate a genuine and sustained concern on the part of the applicant about the conduct of these proceedings and the interests of the minor child.

[29] The third ground of objection is therefore dismissed.

FOURTH GROUND OF OBJECTION: INCURABLE PREJUDICE

[30] The respondent's fourth and most substantive ground of opposition is that the amendment will cause her structural prejudice that cannot be cured by a costs order. She contends that she will need to reopen and redesign trial preparation, revisit discovery, and potentially commission fresh expert evidence. She argues that this "structural prejudice" is qualitatively different from ordinary inconvenience and cannot be neutralised by a costs award.

[31] I have carefully considered this submission but am unable to accept it for the following reasons:

a. The starting point is the nature of the existing dispute. The parties have at all times been in dispute about the residency of the minor child. The respondent's own case has consistently sought primary residence. The question of where the minor child should primarily reside, and all the factual considerations that bear on that question, including the conduct of both parents, the existing arrangements, the best-interests’ factors, and

the evidence of experts, has always been and will always be the central question for the trial court. The applicant's original claim for shared residence was itself a claim about the same subject matter, involving the same child, the same factual matrix, and the same legal framework.

b. What the proposed amendment does, in substance, is to shift the applicant's position from shared residence to primary residence and to articulate the factual basis for that shift. It does not introduce a new cause of action. It does not introduce an entirely new factual matrix. The subject matter remains the same: the best interests of the minor child in relation to primary residence, contact and maintenance. The respondent was already required to prepare a case about primary residence as it is the very relief she has sought in her own counterclaim.

c. In assessing prejudice, the court asks whether the parties can fairly be restored, for the purposes of justice, to the position they were in before the pleading now sought to be amended was filed. Given that the matter remains at a very early stage where discovery has not even commenced, the respondent is in a relatively favourable position to meet the amended case. She has not yet committed to any particular discovery strategy, has not yet commissioned or filed any expert evidence, and has not conducted any trial preparation that would need to be undone. As the court recognised in *Apex Truck & Trailer* supra, an amendment application brought after the close of pleadings but before discovery is far from a late amendment that disrupts an advanced trial preparation process.

d. The respondent argues that the amendment broadens the pleaded case by introducing a mass of new allegations. That is true in the sense that additional sub-paragraphs are being introduced, but those allegations relating to alienation, obstruction of contact, failure to share information, hostile conduct in litigation and related matters, are directly concerned with facts that will arise in any event in the context of the best-interests enquiry. The respondent will have to address these matters whether or not they are formally pleaded, because they form part of the factual landscape concerning primary residence. Their formal introduction into the pleadings does not create new obligations for the respondent beyond what the nature of the trial already requires.

e. The respondent's complaint that she will need to seek or commission expert evidence to meet the new primary-residence case is difficult to accept in circumstances where she herself seeks primary residence and was already a party to and aware of the process ordered by Acting Justice Bezuidenhout regarding expert appointment. The fact that the expert process has not been completed is not attributable to the applicant's proposed amendment. On the respondent's own papers, it is she who has been non-compliant with the orders regarding expert appointment.

f. The respondent further argues that the amendment requires her to "prepare a new defence architecture." That submission overstates the position; the defence in relation to primary residence has always been in issue. The respondent's counterclaim seeks primary residence. Her case in support of that claim, and in opposition to the applicant's amended

claim for primary residence, draws on the same facts, the same events, and the same evidence as before. The shift from opposing a shared-residence claim to opposing a primary-residence claim does not require the wholesale reconstruction of the respondent's case; it requires adjustment and expansion of a case that was already being prepared.

g. The applicant further relies, correctly, on the principle confirmed in *Amod v South African Mutual Fire and General Insurance Co Ltd*[14], that the fact that an amendment may result in the respondent losing primary residence of the minor child is not in itself the type of prejudice that should prevent an amendment. The notion of prejudice in amendment jurisprudence does not encompass the possibility that the opposing party may ultimately lose on the merits of the amended case. The prejudice that can defeat an amendment is the kind that prevents the opposing party from fairly meeting the amended case and not the prospect of being met with a stronger case.

h. Finally, the respondent's submission under this ground invokes the notion of "structural prejudice" as if it constitutes an independent and elevated category of prejudice immune from cure by costs. That submission is not accepted. Prejudice in amendment jurisprudence is assessed on the facts of each case. The question in each case is whether the opposing party can be fairly placed back in the position she was in before the amendment. On these facts, and at this stage of the proceedings, the respondent can be so placed. Any disruption to her existing preparation, modest as it has been in circumstances where discovery has not

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[14] 1971 (2) SA 611 (N) at 615A

commenced, can be adequately compensated by an appropriate costs order.

[32] The fourth ground of objection is accordingly dismissed.

THE "BEST INTERESTS" ARGUMENT

[33] The respondent's heads raise what she terms the "best-interests" argument; namely, that the applicant cannot rely on section 28 of the Constitution and the best-interests standard to cure procedural defects or to justify an amendment that fails to meet the *Moolman* test. That proposition is accepted as far as it goes. Section 28 does not suspend the requirements of procedural fairness. It does not mean that every amendment touching on children's matters must be granted.

[34] However, the *Moolman* test is satisfied in this case: the amendment is not *mala fide* and the respondent has not demonstrated irremediable prejudice. In those circumstances, the fact that the amendment is framed in terms of and directed toward the best interests of the minor child is not an illegitimate consideration; it is a reinforcing consideration. The constitutional imperative that a child's best interests be served in all matters concerning the child means that, where the court is otherwise disposed to grant an amendment, the best-interests dimension provides an additional reason for doing so. The trial court will determine what the best interests of the minor child require. It cannot do so adequately if the pleadings do not properly reflect the applicant's case in that regard.

[35] The respondent's further argument that the best-interests framework should make the court "more, not less, careful" about permitting amendments is not

without merit as a general proposition. A court should indeed exercise care to ensure that proceedings concerning children are not unnecessarily broadened or burdened with collateral disputes. However, that consideration cuts both ways; it also means that the court should be cautious about refusing amendments that are necessary to ensure that the trial court has a complete picture of the factual matrix bearing on the child's best interests. In this case, the balance comes down firmly in favour of allowing the amendment.

COSTS

[36] The applicant seeks a costs order against the respondent for opposing the amendment. The respondent seeks a costs order against the applicant if the application is dismissed, or alternatively that each party should bear its own costs if a portion of the amendment is allowed.

[37] The general rule is that costs follow the result. The respondent has opposed this application and has raised four grounds of objection, all of which I have found to be without merit. It is necessary to say something more about the quality of the opposition.

[38] The respondent's heads of argument are carefully crafted and represent an earnest attempt to engage with the legal principles. I do not doubt the genuineness of the respondent's concerns about the amendment. However, the four grounds advanced are in material respects misconceived. The pendency-of-appeals ground is a misapplication of relevant principles. The vague-and-embarrassing ground is logically inconsistent with the respondent's own detailed engagement with the proposed allegations. The bona fides objection is predicated on a legal premise that does not accurately reflect the

law, namely that a juridical trigger is required to amend pleadings. And the prejudice submission overstates the disruption that flows from an amendment at this early stage of proceedings.

[39] The applicant's attorneys drew the flaws in the respondent's objection to her attention in correspondence after receipt of the notice of objection. The respondent nonetheless persisted with the opposition. As held in *Rabinowitz v Van Graan and Others*[15], a costs order may be appropriate where a party has been warned that its opposition is misconceived and has proceeded regardless. In *Mancisco & sons CC (in liquidation) v Stone*[16] at paragraph 182B, Flemming DJP reiterated the general principle that an award of costs is principally a discretion which must be judicially exercised in the sense that it must be guided by established and known considerations. The award of costs rests upon the object of reimbursing a person for costs to which he was wrongly put.[17]

[40] I am satisfied that a costs order against the respondent is warranted. There is no basis on these facts for an enhanced attorney-and-client scale; the respondent was entitled to oppose the application and her opposition, while ultimately unsuccessful, was not so unreasonable as to justify a punitive costs order. Costs will be on the party-and-party scale.

ORDER

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

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[15] 2013 (5) SA 315 (GSJ)
[16] 2001 (1) SA 168 (W) at 181D
[17] Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

a. The application for leave to amend the applicant's particulars of claim in accordance with the notice of intention to amend dated 9 October 2025 is granted.

b. The respondent is directed to pay the costs of this application on the party-and-party scale.

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R LANGE

ACTING JUDGE OF THE HIGH COURT

Gauteng Local Division, Johannesburg

Appearances

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