**REPUBLIC OF SOUTH AFRICA**

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

Case Number: 2022 - 027490

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISE

[redacted]

SIGNATURE DATE: 1 June 2026

In the matter between:

**BREXIA CC** Applicant

And

**JOSEF SEIDL** First Respondent

**LYNETTE SEIDL** Second Respondent

**GROVE ATTORNEYS INCORPORATED** Third Respondent

**Coram:** Noko J

**Heard on:** 14 April 2026

**Delivered on:** 1 June 2026

**Summary:** Application – Rule 28 (4) of the Uniform Rules of Court – amending Notice of motion – amendment not supported by facts in the founding affidavit – only in the replying affidavit – application dismissed.

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**ORDER**

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On the application to amend, the following order is made:

1. Application for the amendment is dismissed.
2. The applicant is ordered to pay costs on a party and party scale, including costs of counsel on scale B.

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**JUDGMENT**

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**NOKO J**

*Introduction*

[1] The applicant instituted an interlocutory application seeking an order to amend the notice of motion in terms of rule 28(4) of the Uniform Rules of Court. The applicant seeks to substitute prayers 1.2 and 1.5, add a new prayer 1.5, and add an alternative prayer based on a claim of unjust enrichment. The main application is instituted by Brexia cc, based on the Joint Venture agreement entered into between Brexia cc and Josef Seidl.

[2] The first respondent, Josef Seidl, opposes the proposed amendments on the ground that the applicant seeks to introduce prayers unsupported by factual averments in the founding affidavit, and that the unjust enrichment claim has prescribed.

*Background*

[3] The applicant and the first respondent entered into a joint venture agreement on 2 June 2012 in terms of which the applicant advanced funds to the first respondent. The advance was intended to finance the rezoning of the first respondent's property. The parties agreed that, once the rezoning was completed, the property would be sold. The applicant would be repaid the amount advanced and would also share in the net profit. The applicant avers that the first respondent has breached the agreement and has subsequently filed a civil suit.

[4] The respondent averred in his answering affidavit that the National Credit Act ("the Act") applies and that it requires the applicant to register as a credit provider before entering into the agreement between the parties. Accordingly, the agreement should be declared void because the applicant was not registered. In light of the possibility that the agreement may be declared void, the applicant seeks, *inter alia*, to add a claim for unjust enrichment. The applicant subsequently served a notice of intention to amend, which the first respondent opposed. The applicant then instituted this application for leave to amend.

*Parties' Contentions and Submissions.*

*Failure to apply for Condonation*

[5] The applicant contended that the answering affidavit was served 7 months late and, in the absence of an application for condonation, should be treated as pro non scripto. The respondent contended that the applicant had also filed his affidavit 8 months later and failed to seek condonation. In these circumstances, the Court should pay no attention to the issue of condonation and adjudicate on the merits of the application.

[6] Reference was made to *Pangbourne Properties,*[1] where the court held that late filing may be by agreement between the parties or accepted by the court in the interest of justice. The Court went further to state that:

> "In the matter under consideration, all the papers are before me and the matter is ready to be dealt with. To uphold the argument that the replying

[1] *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ).

> affidavit and consequently also the answering affidavit, fall to be disregarded because they were filed out of time will be too formalistic an exercise in futility and leave the parties to commence the same proceedings on the same facts *de novo*."[2]

[7] My view aligns with the sentiments expressed, and I find that, in the absence of any prejudice likely to be suffered by either party, blind compliance with the rules would, in the circumstances, frustrate the attainment of justice between the parties. I therefore find the point raised by the parties unsustainable and accept both the answering and the replying affidavits filed by the parties.

*Commissioning of the respondent's affidavit*

[8] The applicant argued that the answering affidavit was also not properly commissioned, and despite an undertaking that a properly commissioned affidavit would be served, one was served at the hearing. I traced the properly commissioned respondent's answering affidavit, uploaded to CaseLines, and accepted that the applicant's grievance was resolved.

*Merits*

[9] As a prelude, the applicant avers that there was uncertainty until the SCA held in *Du Bruyn No*[3] that section 40 of the Act states that a person who provides credit above the prescribed threshold must register as a credit provider. This aspect compelled the applicant to reconsider its position and to raise unjust enrichment as a cause of action in the replying affidavit. In any event, the applicant argued, the factual position has been comprehensively set out in the applicant's affidavits.

[10] As set out above, the respondent contended that the introduction of unjustified enrichment in the notice of motion, as proposed, cannot be countenanced, as it should be mirrored in the founding affidavit. Further, the applicant's submission that the factual averments in the replying affidavit should suffice to address the respondent's concern is unsustainable.

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[2] Id at para 18.
[3] *Du Bruyn No and Others v Karsten* [2018] ZASCA 143, 2019 (1) SA 403 (SCA).

[11] The respondent further argued that the claim, based on unjust enrichment, has prescribed because 3 years have elapsed without interruption. In turn, the applicant contended that the SCA in *Rustenburg Platinum Mines Ltd*[4] clarified the question of prescription, holding that a distinction must be drawn between the prescription of a debt (claim) and that of a cause of action. The Prescription Act[5] relates to the debt and not the cause of action. In *casu*, the applicant correctly argued that the debt remains the same, and therefore, prescription is not engaged.

*Issue(s)*

[12] The issue for determination is whether a case has been made for the amendment sought by the applicant.

*Legal framework and analysis.*

[13] It is settled law in our jurisprudence that an amendment may be allowed at any time before judgment, provided that any prejudice suffered by the respondent can be compensated by a costs order. It was held in *Affordable Medicines*[6] that:

> "The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or '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.' These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand."[7]

[4] *Rustenburg Platinum Mines Ltd v Industrial Maintenance Painting Services CC* [2008] ZASCA 108; [2009] 1 All SA 275 (SCA).
[5] Act 68 of 1969.
[6] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC). Also referred to in the applicant's heads of Argument at para 19.
[7] Id at para 9.

[14] In addition, an application is not there for the taking and must be supported by proper reasons and must raise a triable issue.

[15] It is trite that a litigant must set out its case in the founding affidavit, not in the replying affidavit, as the object of the reply is to respond to averments in the answering affidavit, not to make a new case. There are instances in which a party may ask the court to include additional facts in the replying affidavit. Such an instruction should be made with the court's leave. It was held in *Mostert*[8] that:

> "It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. See the oft-quoted dictum in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) at 177G-178A and the judgment of this court in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs."[9]

[16] The applicant has conceded that the new cause of action has been raised only in the replying affidavit. The applicant's heads of argument stated that:

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[8] *Mostert v Firstrand Bank t/a RMB Private Bank* [2018] ZASCA 54; 2018 (4) SA 443 (SCA).

[9] Id at para 13. See also *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) Jafta J stated at para 114 that "[h]olding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded..."

> "The respondents are correct that aspects of unjustified enrichment had not been canvassed in the relief that the Applicant seeks". Para 20 HoA at 13-9 and further that "had the Applicant been aware that there was indeed reliance place (sic) by the Respondents on the NCA the same would have been addressed in the founding affidavit". para 22 13-9.

[17] This Court is not called upon to decide whether material introduced in the replying affidavit should be admitted. To this end, I am limited to considering issues raised in relation to the founding affidavit, not new issues raised in the replying affidavit. The applicant's concession, as set out above, signals the end of its case, and it should first approach the court to admit a new fact or file a supplementary founding affidavit.

*Conclusion*

[18] To the extent that the proposed amendments are not foreshadowed in the applicant's founding affidavit, the application is unsustainable. My finding that the Prescription Act[10] is not implicated, does not disturb the conclusion that the application is bound to be dismissed.

*Costs*

[19] Costs should follow the results.

*Order*

[20] As a result, I make the following order

1. Application for the amendment is dismissed.
2. The applicant is ordered to pay costs on a party and party scale, including costs of counsel on scale B.

[redacted]

**M V NOKO**
Judge of the High Court

[10] 68 of 1969.

DISCLAIMER: This judgment was prepared and is handed down electronically by circulation to the Parties /their legal representatives via email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 1 June 2026.

*Appearances:*

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| For the Applicant: | W Bava, instructed by Stan Fanaroff & Associates |
| For the Respondent: | C Brits, instructed by Groves Attorneys Inc c/o Kruger & Pottinger Attorneys. |