



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

Case No: 2148/2024

In the matter between:

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

APPLICANT

ID NO: 5[...]

and

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

RESPONDENT

ID NO: 5[...]

Coram: Masike AJ

Date Heard: 29 May 2026

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail, and released to SAFLII. The date that the judgment is deemed to be handed down is **28 AUGUST 2026 at 10h00**.

Summary: Civil Procedure – application for leave to amend under rule 28(4) – application opposed – respondent contending amendment sought not *bona fide* – Court examining test for good faith in application for leave to amend – Court finding application is made in good faith – respondent contending amendment will cause prejudice – court finding perceived prejudice can be cured by an appropriate cost order – respondent contending amended particulars of claim would be excepiable – court deciding on the question – court finding the pleading as amended would be excipiable - the application for amendment refused – Costs trite principles followed.

JUDGMENT

MASIKE AJ

Introduction

[1] This is an application under rule 28(4) of the Uniform Rule of Court ('URC'). The genesis of this application stems from a divorce action instituted by the applicant against the respondent. The applicant is the plaintiff in the main action, and the respondent is the defendant. For the sake of brevity, I shall refer to the parties as cited in this application. The applicant seeks leave to amend her particulars of claim to introduce a claim of forfeiture of the joint estate against the respondent and to propose a manner to divide the assets in the joint estate. The respondent has opposed the application.

Factual Background

[2] The applicant, Mrs E[...] M[...] S[...], married Mr M[...] E[...] S[...] on 28 August 1983 in community of property, and the marriage still subsists. There are no minor children born out of the marriage, and both parties are pensioners.

[3] The applicant instituted divorce proceedings against the respondent on 29 April 2024. The summons was served on the respondent, who defended the action. A plea and counterclaim were filed. In the particulars of claim, the applicant sought a decree of divorce and division of the joint estate. The applicant in her particulars of claim set out how the joint estate should be divided. The respondent, in his plea to the particulars of the claim, pleaded that certain properties, which the applicant believed formed part of the joint estate, did not form part of the joint estate and should be excluded from the division of the joint estate.

[4] As a result of the plea to the particulars of claim and certain documents which were discovered by the respondent, evincing that two of the immovable properties do not form part of the joint estate, the applicant served a notice in terms of rule 28(1) of the URC in which she seeks to amend her particulars of claim and seeks an order for the respondent to forfeit 50% of his half share in the property situated at 1[...], Unit 6 Mmabatho, 2735, North West Province ('the Unit 6 property').

[5] The applicant seeks to further amend her particulars of claim to regulate the division of the motor vehicles between the parties. The applicant seeks further to amend the particulars of claim to deal with the various livestock acquired during the subsistence of the marriage, which includes ten cows, sixty-four goats and a number of chickens ('the livestock').

[6] The applicant further seeks an amendment to her particulars of claim to read that the ‘Defendant to wholly forfeit his entitled half share’. The applicant further seeks to amend the prayers in the particulars of claim to read that, amongst others, the parties divide the livestock equally between the applicant and the respondent, that the respondent retain the motor vehicle in his possession and the applicant retain the motor vehicle in her possession, that the respondent forfeit, entirely, his entitled half-share of the joint estate.

[7] The respondent filed an objection to the applicant’s notice under rule 28(1) of the URC. The notice of the respondent under rule 28(3) of the URC reads that the intended amendment is *mala fide*, the intended amendment would prejudice the respondent, the intended amendment is intended to delay finalisation of the divorce action, and that, should the intended amendment be granted, this would result in the pleadings being vague and embarrassing and therefore excipiable. Following the respondent's objection to the intended amendment, the applicant filed the present application for leave to amend.

Legal Principles

[8] Rule 28 of the URC regulates amendments to pleadings. A court hearing an application for an amendment has discretion as to whether to grant it or not, a discretion which must be exercised judicially.¹ The primary purpose of allowing an amendment is to provide proper ventilation of the dispute between the parties and to determine the real issues between them, so that justice may be done.²

¹ *Caxton Ltd v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565G; *Brocsand (Pty) Ltd v Tip Trans Resources and Others* 2021 (5) SA 457 (SCA) para 15

² *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638A (*Trans-Drakensberg*)

[9] 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.³ The following statement by Watermeyer J in *Moolman v Estate Moolman*⁴ 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.’

[10] The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent.⁵ Prejudice ‘embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party’s rights’.⁶ The onus is on the party seeking the amendment to establish that the other party will not be prejudiced by it.⁷

[11] The court will allow the amendment of a prayer if the main issue between the parties remains the same but will not readily do so if the addition of a prayer also entails the introduction of a new cause of action.⁸

³ *Trans-Drakensberg* at 638H–639E

⁴ 1927 CPD 27 at 29

⁵ *Media 24 (Pty) Ltd v Nhleko & Another* (Case no 109/22) [2023] ZASCA 77 (29 May 2023) (*Media 24*) para 16.

⁶ *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 296A–C

⁷ *Trans-Drakensberg Bank* at 640H;

⁸ *Tomassini v Dos Remedios* 1961 (1) SA 226 (W); *A.D obo O.M, L.D and C.D v Buffalo City Metropolitan Municipality* (EL 2440/2023) [2025] ZAECELLC 1 (21 January 2025) para 18.

[12] Delay in bringing forward an amendment is in itself, in the absence of prejudice, no ground for refusing an amendment.⁹ The court will not grant an amendment if its introduction into the pleading would render it excipiable.¹⁰ In *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste*¹¹ it was held that where an objection is raised to a proposed amendment to a pleading on the ground that the pleading as amended would be excipiable, the court should not confine itself to an inquiry as to whether or not the question of excipiability is arguable — the court should decide on the question and if it finds that the pleading as amended would be excipiable, the application for amendment should be refused.

Analysis

[13] The respondent has raised several grounds in support of his opposition to the applicant's application for leave to amend the particulars of claim. The grounds for opposition are: (a) the reasons for the proposed forfeiture are unfounded and not supported by any evidence; (b) the intended amendment is intended to delay the conclusion of the main action because the applicant is solely benefitting from the rentals of the backroom at the house situated at unit 6; (c) the founding affidavit in support of the application for leave to amend is not based on truthful events, the respondent denies that his conduct led to the breakdown of the marriage; (d) the relief sought is not in line with section 9 of the Divorce Act; (e) the applicant failed to show cause how the granting of leave to amend would have prospects of success in the main action.

⁹ *Trans-Drakensberg Bank* at 642C-D.

¹⁰ *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B; *YB v SB* 2016 (1) SA 47 (WCC) at 51E–

F; *Apex Truck & Trailer v PPCF Boerdery CC* (unreported, GJ case no 21/37786 dated 10 May 2024) at para 14

¹¹ 1980 (1) SA 250 (C) at 258H–259A.

[14] There is no merit in the grounds of opposition relied upon by the respondent summarised in paragraph 13 above. In so far as it relates to the grounds listed under (a), (c), (d) and (e), these are issues that would have to be addressed before the trial court dealing with the main action, not in this Court, this Court is tasked with the application for leave to amend, not making factual findings on which version is to be accepted and which version is to be rejected regarding contribution to the joint estate, and whose conduct contributed to the breakdown of the marriage.

[15] In *Media 24* at paragraph 18, the court said the following:

‘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.... As has often been stated by our courts, 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.’ (my emphasis)

[16] The applicant is not at this stage required to prove her case in the intended amended particulars of claim or as stated in *Media 24*; describe the evidence that she will lead at trial; what is required of the applicant is to state the material facts on which she relies to prove her claim for forfeiture against the respondent.

[17] As it relates to the ground listed in (b), from the submissions made by counsel for the respondent at the hearing of this application, this Court understood the ground to be that the application for leave to amend is *mala fide* because the applicant seeks to delay finalisation of the divorce action as the applicant is benefiting from the rentals of the rooms at the Unit 6 property. In the context of an amendment application, the test for ‘good faith’ is whether the

application is brought for an improper purpose unrelated to the legitimate pursuit of the party's rights.

[18] The case of the applicant is that, because of what was disclosed in the respondents' plea to the particulars of claim and what was discovered during discovery, the other two immovable properties that the applicant thought formed part of the joint estate did not form part of the joint estate and actually belonged to the late mother of the respondent and were bequeathed to him in his late mother's will which specifically provided that the two immovable properties should not form part of any marriage (future or present) or any communal estate. The applicant decided to amend her particulars of claim to seek an order directing that the respondent has forfeited his 50% share in the Unit 6 property.

[19] It is the view of this Court that there is no bad faith in the decision to seek the amendment for the reasons quoted in paragraph 18 above. It was submitted by counsel for the respondent that the applicant delayed in bringing the notice of intention to amend and, as a result, the respondent is prejudiced. There is no merit in this submission either. Delay in bringing forward an amendment is in itself, in the absence of prejudice, no ground for refusing an amendment.

[20] The prejudice that the respondent alleges he will suffer is that the finalisation of the divorce action will be delayed. In my view, this is prejudice that can be cured by an appropriate cost order. There is accordingly no merit in the submission that the respondent will suffer prejudice because there has been a delay in bringing the amendment.

[21] The respondent in his notice in terms of rule 28(3) states that the prayers sought to be introduced in the amended particulars of claim at 5.1 to 5.3 are contradictory to the prayer sought in prayer 8. It is further stated on behalf of the respondent that this would make the pleadings vague and embarrassing and therefore excipiable.

[22] When this application was argued before this Court, counsel for the applicant was asked to address this Court on the contention that, if the application for leave to amend is granted, the amended particulars of claim would be excipiable because the prayers in the amended particulars of claim at paragraphs 5.1 to 5.3 would be contradictory to the prayer in 8. Counsel for the applicant insisted that the applicant should be given an opportunity to prove her case in terms s 9 of the Divorce Act 70 of 1979.¹²

[23] It would be apposite to quote the relief sought in prayers 5, 5.1 to 5.3 and prayer 8 as stated in the notice in terms of rule 28(1) of the applicant. The prayers read as follows:

‘5. There are various livestock acquired during the subsistence of the marriage which are as follows:

5.1 Ten (10) cows situated at 1[...] Mocoseng Village (next to Tip Top on Mocoseng Road) to be shared equally amongst the Plaintiff abd Defendant;

5.2 Sixty-four (64) goats situated at 1[...] Mocoseng Village (next to Tip Top on Mocoseng Road) to be shared equally amongst the Plaintiff and the Defendant; and

¹² 9. **Forfeiture of patrimonial benefits of marriage**

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage, including a Muslim Marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

5.3 Chickens (number of chickens unknown) situated at 1[...] Mocoseng Village (next to Tip Top on Mocoseng Road) to be shared equally amongst the Plaintiff and the Defendant

...

8. The Defendant to forfeit, entirely, his entitled half share of the joint estate;'

[24] The prayers in paragraph 5, 5.1 to 5.3 are contradictory to the prayer sought in paragraph 8. A party in legal proceedings is not allowed to approbate and reprobate. This means that the party is not allowed to adopt two positions inconsistent with one another or, as is commonly expressed, to blow hot and cold.¹³

[25] The amendment sought, if granted, will result in the amended particulars being excepiable; the amended particulars of claim will be vague and embarrassing. On the one hand, the applicant, in paragraphs 5.1 to 5.3, seeks an order for equal division of the assets forming part of the joint estate, and, on the other hand, in paragraph 8, she seeks an order that the respondent forfeit his entitled half share of the joint estate entirely; the prayers are contradictory. The authorities referred to above are clear on this issue: the court may refuse an application for leave to amend if the amendment would render the particulars of claim as amended excipiable. The application for leave to amend must for this reason fail.

Costs

[26] Costs follow the cause, and this Court has not found any reason to deviate from this principle. The matter was not complex, and this Court accepts that it is of importance to the parties.

¹³ *Hlatshwayo v Mare and Deas* 1912 AD 242 at page 259

Order

[27] Resultantly, the following order is made:

1. The application for leave to amend the particulars of claim of the applicant is dismissed.
2. The applicant is ordered to pay the costs of this application on a party-and-party scale, scale 'A'.
3. The trial of the main action serving before Masike AJ is to continue to be heard on 30 September 2026, in open court.

T MASIKE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

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