

SOUTH AFRICA / JUDGMENT

D.S v D.B (13336/16) [2017] ZAKZDHC 22 (15 May 2017) [2017] ZAKZDHC 22

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Kruger

CASE / FILE NUMBER

13336/16

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, DURBAN

REPORTABLE

Case

No: 13336/16

In the

matter between:

D

S Applicant

and

D

B Respondent

Coram:

Kruger J

Heard:

8 May 2017

Delivered: 15 May 2017

ORDER

A.

APPLICATION IN TERMS OF RULE 33(4).

1.

The questions of law/and or fact contained in paragraph 4 of the Plaintiff's particulars of claim (read with paragraph 4 of the Defendant's plea) and paragraphs 1 and 2 of the Defendant's special plea under Case No. 13336/2014 are to be determined separately by the trial court in terms of Rule 33(4) and prior to any other questions of law and/fact.

2.

The remaining issues arising in the action are to be determined, if necessary, after the final determination of the issues referred to in 1 above.

B.

COUNTER -APPLICATION

1.

The Plaintiff's counter-application is dismissed.

C.

COSTS

1.

The Plaintiff, D B is directed to pay the Defendant's costs of the Rule 33(4) application as well as the counter-application.

Such costs are:

(a) to be paid on the scale as between attorney and client.

(b) to include the costs of two counsel where the services of two counsel have been engaged.

JUDGMENT

KRUGER J:

BACKGROUND

- [1] On the 18th November 2014, the Respondent/Plaintiff instituted an action out of this Court, against the Applicant/Defendant. For the sake of convenience, the parties will be referred to as in the said action, as Plaintiff and Defendant respectively. In the said action, the Plaintiff claimed a decree of divorce and further relief in respect of maintenance and "an amount equal to one half of the net (sic) value of the Defendant's estate".

[2] Paragraph 4 of the particulars of claim provides:

“The Plaintiff and the Defendant were married to each other, according to the laws of England, in London, England, on 18th August 2007.”

[3] The Defendant has defended the action. In a special plea he has averred:

“1. The Defendant denies that the Plaintiff and Defendant were married to each other either as alleged or at all.

2. The Defendant accordingly further denies that this Honourable Court has jurisdiction in this action”.

[4] The Action has not as yet been set down for trial. Given the nature of the averments in paragraph 4 of the particulars of claim and the special plea raised in response thereto, (as outlined above) and given the Plaintiff’s reluctance to agree to a separation of the issues, the Defendant brought an application, in terms of the provisions of Rule 33(4), for the separate determination of the Plaintiff’s averment as well as the special plea.

[5] In response thereto the Plaintiff sought to amend her particulars of claim and served the relevant notice on the Defendant. The Defendant objected to the proposed amendment. For reasons unknown, the Plaintiff failed to timeously bring an application to effect the amendments and the amendments duly lapsed. Thereafter the Plaintiff filed another notice of her intention to amend her particulars of claim. This notice was in the exact terms as the previous one. The Defendant once again objected to the proposed amendment in exactly the same terms as the previous objection.

[6] The Plaintiff thereafter opposed the application in terms of Rule 33(4) and has filed a counter-application in terms of which she seeks (a) to amend her particulars of claim, in terms of Rule 28, and (b) that Sharon Wapnick and her firm Tugendhaft Wapnick Banchetti & Partners are declared to have a conflict of interest and be directed to withdraw as attorneys for the Defendant.

[7] This counter-application has been opposed by the Defendant and a lengthy affidavit has been filed on his behalf. The Plaintiff however has elected not to file a replying affidavit thereto.

PROPOSED AMENDMENT TO THE PLEADINGS

[8] In her notice in terms of Rule 28, the Plaintiff has sought to amend her particulars of claim as follows:

“1. By the deletion of the existing particulars of claim and a substitution therefore of the particulars of claim annexed hereto.”

- [9] The first eleven paragraphs of the plaintiff's proposed amended particulars of claim are identical to the original particulars of claim save that in paragraph 11.1, the amount claimed by the Plaintiff as "periodical payments" has been increased from R50 000,00 per month to R100 000,00 per month. In addition thereto, and in paragraphs 12 to 24 of the proposed amendment, the Plaintiff has sought to introduce alternate claims against the Defendant. These alternate claims are;
- (a) In the event that a Court finds that the marriage was not valid, then it is alleged that there was a putative marriage and the Plaintiff is entitled to the consequences that flow therefrom;
 - (b) A claim for breach of a promise to marry, in the event that the Court does not find that there was a putative marriage, and
 - (c) In terms of a written agreement concluded on the 2nd April 2007, the Defendant is liable to pay to the Plaintiff certain cash payments and property.
- [10] The Defendant has objected to the Plaintiff's proposed amendments and has filed a detailed notice outlining the grounds of his objection. These may be summarised as being, inter alia, the following:
- a) That the averments lack sufficient particularity and are accordingly vague and embarrassing;
 - b) That the alternate claims which the Plaintiff seeks to introduce have prescribed;
 - c) In the event that the Court finds that there is no marriage between the parties, this Court would lack jurisdiction in respect of the proposed alternate claims;
 - d) In addition thereto the Defendant has alleged that any claims by the Plaintiff have been compromised by virtue of a settlement agreement dated 11th December 2007.
- [11] The Plaintiff has not responded to these objections save to the limited degree that is described hereinafter. In her heads of argument and in argument before me, Counsel for the Plaintiff has addressed only the issue of jurisdiction. This will be addressed later in this judgment.
- [12] The primary object of allowing an amendment is "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done." – Cross v Ferreira 1950(3) SA443 (CPD) at 447.
- [13] "..... The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is male 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." – Moolman v Estate Moolman 1927 CPD 27 at 29. See also Four Tower Investments (Pty) Ltd v Andres Motors 2005(3) SA 39 (NPD) at paragraph 15.

- [14] “The amendment must be bona fide and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue”. Erasmus – Superior Court Practice B1-180; Trans Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967(3) SA 632(D) at 640 H.
- [15] Counsel for the Plaintiff has submitted that should the proposed amendment be disallowed, the Plaintiff would be entitled to issue a summons, claiming the alternative relief that she seeks in the proposed amendment and the self-same issues would then come before the Court again. I disagree. This Court would lack the necessary jurisdiction to entertain the “alternate claims” should the Plaintiff elect to issue a summons out of this Court. This is simply because the Defendant is ordinarily resident and carries on business in Gauteng. (This is common cause). The crucial element of “the same Court” is therefore lacking.
- [16] In considering whether an amendment is made bona fide, one must also have regard to the objections raised. The Defendant has averred that the alternate claims in the proposed amendments have prescribed. Although having been made aware of this crucial objection prior to the launching of the application to amend (and indeed the filing of the second notice to amend), the Plaintiff has not countered same nor has she filed a replying affidavit to challenge these averments. Counsel for the Plaintiff has also not addressed this issue in her heads of argument and in argument before me has simply submitted that the claims have not prescribed.
- [17] In the proposed alternate claims the Plaintiff seeks damages for alleged breach of promise to marry; alternatively for an order
- declaring that there was a putative marriage and for an order placing her in the same position that she would allegedly have been had there been a valid marriage (essentially damages); alternatively payment in terms of a dishonoured agreement entered into on the 2nd April 2007.
- [18] During argument however the Plaintiff abandoned the claim for breach of the promise to marry and accordingly does not seek to amend her particulars of claim by including the relief sought as a consequence of the alleged breach.
- [19] On the Defendants version and, at best for the Plaintiff, prescription in respect of these alternate claims commenced to run

from the 11th December 2007. This is the date when an agreement between the parties was entered into. The provisions of the agreement are, in my view extremely important and place in perspective the knowledge, attitude and intention of the parties. This agreement provides, inter alia:

“INTRODUCTION

1. D and D have had an on off relationship for the past two years which they hoped would result in a marriage. This has not occurred

and their relationship and has irretrievably broken down. D and D have agreed to terminate the relationship and part company.

2. On 29 August 2007 D and D concluded an agreement to regulate such an event.
3. This agreement supersedes, replaces and novates the agreement concluded on 29 August 2007.
4. In full and final settlement of all and any claims which D may have against D (without conceding that there are any) from whatever cause and however arising; -"

[20] The Plaintiff accepted the benefits under this agreement and it is noted that she has not tendered restitution of same.

[21] As is evident from the aforesaid excerpts of the agreement, the parties acknowledged that they were not married to each other.

They also acknowledged that their relationship has irretrievably broken down. Prescription, in respect of all claims that the Plaintiff may have had against the Defendant, commenced to run, in my view, from the 11th December 2007. (The Defendant has averred that it commenced earlier – 29th August 2007 – but in light of the decision that I have arrived at, it does not take the matter any further.)

[22] Counsel for the Plaintiff has submitted that the claim in respect of the putative marriage has not prescribed and that prescription will only start to run from the date that the Court concludes that there is no valid marriage between the parties. I disagree. The identity of the “debtor” (as defined in the Prescription Act) and the facts from which the “debt” arose was all known to the Plaintiff from the 11th December 2007 at the very latest. Prescription in respect of all and whatever claims the Plaintiff had in respect of the alleged putative marriage commenced to run from the 11th December 2007. It was then that she opted for the settlement tendered and waived whatever other claims that she may have had.

[23] Counsel for the Defendant has submitted that as the notice to amend (upon which this application is based) is dated 14th March 2016, the alternate claims have thus accordingly lapsed and the application for amendment ought to be refused as no meaningful

purpose would be served in allowing an amendment which would be met by a plea of prescription. There is indeed merit in this

submission. See *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956(1) SA669(T) at 674(G); *Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000(2) SA789 (SCA) at paragraph 20.

[24] I am of the view that as the proposed alternate claims have prescribed, the application for leave to amend cannot be said to be bona fide and the application must fail on this ground alone.

[25] The defendant has also alleged that the proposed alternate claims have not been properly pleaded and are excipiable on the grounds that they are, inter alia, vague and embarrassing. I do not intend to repeat all the objections raised by the Defendant as “vague and embarrassing”. What is clear however is that the Plaintiff has elected not to deal with or answer these objections. Counsel for the Plaintiff has also not addressed this aspect in her heads of argument. In argument before me, counsel for the Plaintiff elected to repeat the proposed amendments and submitted that it is not known how the particulars therein are vague and embarrassing.

[26] In *Cross v Ferreira* (supra) at 449(H), van Winsen AJ (as he then was) held:

“While the practice is not entirely uniform on this point, the weight of authority seems to favour the view that if the pleading as sought to be amended would be excipiable, this affords a ground upon which the Courts may, in the exercise of its discretion, refuse the application for the amendment.”

[27] This view has been consistently followed and confirmed by our Courts.

See *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC and others* 2003(6) SA289(W) at 293 J; *Krischke v Road Accident Fund* 2004(4) SA 358 at paragraph 9.

[28] A perusal of the proposed amendment, together with the Defendant’s objection thereto, reveals that the proposed particulars of claim will be excipiable. For example, there is a lack of particularity regarding the alleged “engagement agreement”;

the basis upon which Annexure “B” to the proposed amended particulars constitutes an antenuptial contract; the particularity

relating to the alleged advice given to the Plaintiff that by marrying the Defendant he would not be compelled to give evidence

against her in her criminal trial; there is no allegation that the Plaintiff bona fide believed that she and the Defendant were married in community of property (this is an essential averment in respect of a putative marriage); or that the “marriage” was indeed in community of property which would be the basis for the Plaintiff’s claim for an amount equal to one half of the nett value of the Defendant’s estate. These are but a few examples which, in my view, show that the proposed amended pleading is so fundamentally flawed that the proposed amendment should be disallowed.

[29] I am therefore not inclined to grant the proposed amendment on the basis that same would be excipiable.

[30] The Defendant has also averred that this Court would lack jurisdiction to entertain the proposed alternate claims. The basis

for this is that the alternate claims do not fall within the ambit of a “divorce action” as defined in the Divorce Act No. 70 of 1979.

[31] Section 2(1) of the Divorce Act 70 of 1979 provides:

“(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –

- a) Domiciled in the area of jurisdiction of the court on the date of which the action is instituted; or
- b) Ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.”

“Divorce Action” is defined in the Divorce Act as follows:

“”Divorce Action” means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes –

- (a) an application pendente lite for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in forma pauperis, or for the substituted service of process in, or the edictal citation of a party to, such action or such application;”

[32] Counsel for the Plaintiff has submitted that the words “a decree of divorce or other relief in connection therewith” are to be interpreted broadly so as to include a claim for divorce or where the validity of the marriage is disputed (as in causu), a claim for a putative marriage or a breach of promise to marry.

[33] In making this submission, counsel has relied on judgments relating to Rule 43 applications. Rule 43 applies “whenever a spouse seeks relief from the Court” in respect of maintenance pendente lite; interim access or custody, and a contribution towards costs in a pending matrimonial action. In *Gunston v Gunston* 1976(3) SA 179 (W) the Court held that “matrimonial actions” include actions for divorce, restitution of conjugal rights, nullity of a marriage and judicial separation” – at 182 B. This, in my view is clearly within the ambit of the provisions of the Divorce Act cited supra. In *Rousalis v Rousalis* 1980(3) SA 446 (C) the Court considered its jurisdiction in a divorce action in which a party claimed (in addition to a decree of divorce) orders sounding in money arising out of an alleged dissolution of a partnership. It was held that the dispute did not concern “other relief in connection” with a decree of divorce as intended in Section 2 of the Divorce Act and that the Court accordingly lacked jurisdiction in respect of that relief. It was held that having regard to Section 2 of the Act, the Court has jurisdiction to order maintenance and costs as relief in connection with a decree of divorce but that

there was no principle or provision which would entitle the Court to settle a partnership dispute where the Defendant was domiciled and resident outside the jurisdiction of the Court. (At pages 449 to 450.)

[34] The proposed alternate claims, in my view, do not fall within the ambit of the decree of divorce nor can it be said to be ancillary to a divorce action. It is common cause that the Defendant does not reside or carry on business within the area of this Court's

jurisdiction. As a result, this Court does not have jurisdiction in respect of the alternate claims as set out in the proposed amendment.

[35] It is also important to note that the alternate claims are conditional on the Court finding that there was no marriage between the parties. If there is no marriage, then there cannot be a divorce and similarly no "divorce action" as defined in Section 2(1) of the Divorce Act. Accordingly, this Court would lack the necessary jurisdiction.

[36] Counsel for the Plaintiff has submitted that in terms of the principle of "causae continentia", this Court will have jurisdiction over the alternative relief or claims. The principle of causae continentia is defined as:

"more than one claim against different persons or in respect of different things in different jurisdictional areas may be joined in one process before one Court if it can be said that together they really constitute one case, in that the one begins where the other ends" – LAWSA 2nd Edition, Volume 11, at paragraph 553.

[37] In my view the principle of "causae continentia" will apply in circumstances where the Court originally has jurisdiction. Causes of action can then be added to the

existing action. In casu however, given the manner in which the proposed alternate claims have been pleaded (as discussed earlier in this judgment) this Court does not have jurisdiction. In any event, as stated earlier in this judgment, if it is found that there is no marriage between the parties, then the Court cannot have jurisdiction.

[38] Finally, the Defendant has objected to the proposed amendment on the basis that the agreement of the 11th December 2007 compromised any claim which the Plaintiff may have against the Defendant from whatever cause arising. Once again the Plaintiff has not contested these averments and once again Counsel has not addressed this issue in her heads of argument nor have any submissions been made on the Plaintiff's behalf.

[39] In concluding the agreement of the 11th December 2007, the Plaintiff was independently represented and there cannot, in my view, be any dispute in respect of the conclusion of the agreement nor of its terms and conditions. I agree with the submission by Mr Subel SC, on behalf of the Defendant, that the proposed alternative causes of actions are precluded by virtue of the agreement of the 11th December 2007. See *Road Accident Fund v Ngubane* 2008(1) SA 432 (SCA) and the authorities cited therein.

[40] In the result, the application for leave to amend must be refused.

SEPARATION OF ISSUES : RULE 33(4)

[41] Rule 33(4) provides as follows:

“If, in any pending action, it appears to the Court mero muto that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the Court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the Court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

[42] Flemming DJP described the rationale underlying Rule 33(4) as follows:

“The entitlement to seek the separation of issues was created in the Court rules so that an alleged lacuna in the Plaintiff’s case or an answer to the case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the Plaintiff’s claim (or one of the claims) without the cost and delays of a full trial. Proper handling of litigation – and accordingly professional handling of a case – requires that this avenue be explored to the advantage of the own client, the flow of court hearings and even of the other client.” – Rauff v Standard Bank Properties (a division of Standard Bank of South Africa Ltd) and another 2002(6) SA 693 (WLD) at paragraph 22.1.

[43] In Denel (Edms) Bpk v Vorster 2004(4) SA481 (SCA) at paragraph 3 Nugent JA remarked:

“Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation it is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.”

[44] Miller J, in Minister of Agriculture v Tongaat Group Ltd 1976(2) SA 357 (D) at 362 H, remarked:

“Rule 33(4) was no doubt conceived in the realisation that in some instances the interests of the parties and the ends of justice would be better served by disposing of a particular issue (or issues) before considering other issues which, depending on the result of the issues singled out, might fall away or become confined to substantially narrower limits.”

At 363 (D) he held:

“The word “convenient” in the context of Rule 33(4) is not used, I think, in the narrow sense in which it is sometimes used to convey the notion of facility or ease or experience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned.”

[45] A perusal of the case law reveals that the Courts were inclined to grant the order, in terms of Rule 33(4) if it appears that the advantages outweigh the disadvantages – *State v Malinde* 1990(1) SA 57 (AD) at 68 C-E – or where the Plaintiff's case does not appear to be strong and the Defendant's prospects of recovering costs, poor – *Sharp v Victoria West Municipality* 1979(3) SA 510 (NC) at 512 B.

[46] Against this backdrop, I turn to consider the submissions of the parties. The Defendant, as Applicant in the Rule 33(4)

application, has submitted that it would be convenient for the Court to decide the issue raised in paragraph 4 of the Plaintiff's

particulars of claim read with the Defendant's special plea. It has also been submitted that should the Court so order, there would be no prejudice to the Plaintiff.

[47] It is the Defendant's contention, as I understand the submission, that it is only in the event that a valid marriage is proven, that a decree of divorce and ancillary relief, sought by the Plaintiff in the divorce proceedings, be competent or sustainable in law. In the event that the Plaintiff fails to prove the alleged marriage, then this Court would lack jurisdiction in this action and no further relief may be ordered.

[48] The Plaintiff however opposes the application on the basis that the evidence surrounding the circumstances of the marriage and the evidence required to determine whether it is valid or not, will be the same evidence as that required to establish and prove the proposed additional claims – viz a putative marriage.

[49] This submission is however based on (what now appears) the misconception that the application to amend will succeed. As stated earlier in this judgment the application to amend is seriously flawed and cannot succeed.

[50] In the result, all that is left before the Court is the original particulars of claim wherein the Plaintiff seeks a decree of divorce and ancillary relief.

[51] I agree with the Defendant's contention that the determination of whether there was a valid marriage or not will not only shorten the proceedings, but will be convenient to all parties and the Court. The reason is clear – absent a marriage, there can be no divorce, no claim for spousal maintenance and no claim for a redistribution or share of the assets of any party.

[52] On the papers before me it is my view that the Plaintiff's prospects of establishing and proving a valid marriage are weak. Accordingly, a separation of the issues would also be beneficial to the Plaintiff as she would not have to endure the costs of a lengthy trial which would involve costly pre-trial preparation especially in the form of discovery. A separation in terms of Rule 33(4) would result in only the documentation relating or pertaining to the question of whether or not there is a valid marriage would need to be discovered. I agree that should a separation not be ordered, it would result in the unnecessary preparation and conduct of a trial on the remaining issues which would be prejudicial to both parties.

[53] The Defendant's application, in terms of Rule 33(4) must therefore succeed.

CONFLICT OF INTEREST

[54] In seeking an order that:

- (a) Sharon Wapnick and Tugendhaft Wapnick Banchetti and Partners be declared to have a conflict of interest and
- (b) That they be directed to withdraw as attorneys for the Defendant.

The Plaintiff essentially relied on averments contained in paragraphs 6 and 7 of her affidavit. The essential averments are the following:

"6.2 Ms Wapnick represented me in criminal charges instituted against me, as a result of an incident at the Saxon Hotel, As my attorney I communicated information to her, much of it may be relevant to the present matter.

.....

6.4 At the criminal trial, which was funded by Mr S, I was represented by Advocate Barry Roux SC (Roux), who was instructed by

Sharon Wapnick.

.....

6.6 At the criminal trial Roux SC advised the prosecutor, Adele Barnard, and Magistrate Reiner Boshoff that Mr S and I had married.

As I recall, Ms Wapnick was present in the criminal court at the time.

6.7 In fact one of the reasons for our marriage at that time was that Mr S wanted to ensure that he did not have to give evidence against me, which he could not be obliged to do if he were married to me.

6.8 Ms Wapnick was a party to this advice.

6.10 Furthermore, Ms Wapnick will be a material witness at the trial, as she;

6.10.1 Drafted the antenuptial contract concluded between myself and Mr S;

6.10.2 Drafted subsequent agreements.

7.1 Ms Wapnick has been requested to withdraw, and the conflict of interest has been brought to her attention.

7.9 Ms Wapnick replied by way of letter dated 8 April 2016, annexed as "DB12".

7.10 I have instructed my attorney to simply reserve my rights to respond to that letter at the appropriate time, in the appropriate forum."

[55] As is evident from the passages quoted above the only instance when it is alleged that the attorney Sharon Wapnick or the firm Tugendhaft Wapnick Benchetti and Partners represented the Plaintiff, is during her criminal trial. This has been denied by the attorneys concerned who have furnished the Court with a transcript of the said criminal proceedings, which transcript totally contradicts the version of the Plaintiff. It is noteworthy that the Plaintiff has not filed a reply in answer to the allegations. What is of importance is that the Plaintiff and her attorneys were made aware of the denial of the conflict allegations and were fully appraised of the situation long before the Plaintiff launched her counter-application. The behaviour of the Plaintiff in this regard is certainly questionable.

[56] In the heads of argument, counsel has sought to rely upon Ms Wapnick's admission that her firm represented the Plaintiff,

for a brief period, in preparing a plea (when the Plaintiff was under bar) in a civil action in 2006. This had nothing to do with the current action or the relationship between the parties. In any event it was not a ground relied upon by the Plaintiff in seeking the relief that she does and which is set out supra.

[57] I am accordingly of the view that the Plaintiff's application in this regard is ill-founded and prima facie male fides. The application is therefore to be dismissed.

COSTS

[58] Counsel for the Plaintiff has submitted that the costs of the application and counter-application be reserved for determination at the trial. I disagree. The Plaintiff's bona fides in opposing the main application and in launching the counter-application is questionable.

[59] The Plaintiff refused to consent to a separation of the issues in terms of Rule 33(4). At the time that the Defendant's

attorneys requested the Plaintiff's consent, the pleadings as they then stood, clearly called for a separation and adjudication of the special plea read with paragraph 4 of the particulars of claim. Instead, the Plaintiff caused the Defendant to launch the application and then delayed same by serving two notices of amendment in terms of Rule 28. As stated earlier in this judgment, the Plaintiff and her legal representatives were fully aware of the nature of the Defendant's objections to the proposed amendment. Instead of re-drafting the notice to amend to cure the defects to which they were alerted, the Plaintiff elected to serve a second notice to amend in exactly the same format as the previous notice. The situation is further aggravated by the fact that the Plaintiff then launched a counter-application to, inter alia, amend her particulars of claim and then elected not to challenge the Defendant's answers in a replying affidavit.

[60] The Plaintiff, in her counter-application, also sought an order declaring that Sharon Wapnick and her firm Tugendhaft Wapnick

Banchetti and Partners are conflicted and are to withdraw as the Defendant's attorneys. As stated earlier in this judgment, there is absolutely no basis for seeking this relief. In her founding affidavit the Plaintiff, notwithstanding her personal first hand knowledge, deliberately made false accusations against the said attorney and her firm. Once again, the Plaintiff and her attorneys were fully aware of Ms Wapnick's version, relating to the alleged conflict, long before they launched the counter-application. Despite Ms Wapnick placing her version before the Plaintiff again, this time on oath, the Plaintiff has not seen fit to withdraw or retract the dishonest allegations, nor has she seen fit to tender an apology to the Court for attempting to mislead it. Instead the Plaintiff elected to persist with the counter-application.

[61] I am of the view that the behaviour of the Plaintiff in opposing the application and in launching the counter-application constitutes an abuse of the Court process and is deserving of this Court's censure.

[62] I accordingly grant the following orders:

B. COUNTER APPLICATION

(b) to include the costs of two counsel where the services of two counsel have been engaged.

KRUGER J

DATE OF HEARING: 8 May 2017

DATE OF JUDGMENT: 15 May 2017

FOR THE APPLICANT: A Subel SC

N Becket-Jones

Instructed by Tugendhaft Wapnick

Banchetti & Partners

FOR THE RESPONDENT: J Julyan SC

P Jorgensen

Instructed by Susan Abro

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