

SOUTH AFRICA / JUDGMENT

K v K (4843/2015) [2017] ZAFSHC 82 (8 June 2017) [2017] ZAFSHC 82

COURT

Free State High Court, Bloemfontein

BEFORE

Snellenburg, AJ

CASE / FILE NUMBER

4843/2015

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 4843/2015

In

the matter between:

M
K Applicant
and
Z
K Respondent

JUDGMENT

BY: SNELLENBURG, AJ

HEARD ON: 18 MAY 2017

DELIVERED ON: 8 JUNE 2017

[1] The applicant applies for leave to amend her counterclaim in the divorce action currently pending between the parties. The applicant

and respondent married each other in community of property on 18 December 1993. Although it is hard to discern at this stage of their marital relationship whether there were many blissful moments, they did have three children of which two are still minor at time of this judgment. Marital problems ultimately culminated in the respondent issuing summons against the applicant on 13 October 2015. In his combined summons the respondent prays for a decree of divorce; orders in connection with care, parental rights and responsibilities and maintenance relating to their children; division of the joint estate and costs of the suit. The applicant in turn served a plea and counterclaim on 4 January 2016. In the counterclaim the applicant in turn prays for a decree of divorce; care, parental rights and responsibilities and maintenance relating to their children; division of the joint estate and costs of the suit.

[2] Litis contestatio commenced on 8 March 2016 when the respondent filed his plea to the applicant's counterclaim. Without delay the respondent's attorney gave notice in terms of the provisions of Uniform rule 37(1) to convene a pre-trial conference which duly took place on 5 April 2016 at the plaintiff's attorneys' offices. The pre-trial conference lasted 20 minutes. The minute reveals amongst other matters that the parties at that stage recorded no prejudice; reserved the right, under the heading "Settlement Proposals", to hold a further pre-trial conference; agreed that there were no issues identified that needed to be decided upon separately in terms of the provisions of Uniform rule 33(4); would file discovery affidavits and the replies thereto no later than 29 April 2016 and agreed that the main points in issue at the trial are the quantum of maintenance for the minor children,

how the joint estate should be divided and who should pay the costs of the action. Hereafter the applicant served a request for further particulars on the respondent on 23 May 2016 and the respondent served a request of similar nature on the applicant on 30 June 2016. Neither of the aforementioned questionnaires have been answered to date. Discovery also did not take place within the agreed time.

[3] During August 2016 the applicant terminated the mandate of the attorneys then acting on her behalf. The erstwhile attorneys filed the notice of withdrawal as attorneys of record on 10 August 2016. On 8 September 2016 the respondent issued an application in terms of s 20 of the Matrimonial Property Act 80 of 1984 seeking the immediate division of the joint estate and related relief ["the division application"]. On 27 September 2016 the applicant's current attorneys came on record. The division application was opposed by means of an answering

affidavit which was filed on 15 November 2016. In the aforesaid answering affidavit the applicant foreshadowed her intention to amend the counterclaim by deleting the prayer for division of the joint estate and inserting a claim for forfeiture of the patrimonial benefits of marriage in favour of the applicant as envisaged by s 9 of the Divorce Act, 70 of 1979 [“the Divorce Act”]. The applicant hereafter gave notice of the intended amendment in terms of the provisions of Uniform rule 28 to which the respondent objected on the grounds which I will deal with below. The respondent proceeded to file his replying affidavit

in the division application. In his answering affidavit the respondent amongst other matters relied on the grounds for objection

to the amendment and persisted that the division application be determined. The division application was however postponed pending

finalisation of this application.

[4] The respondent objects to the amendment on the following grounds:

4.1 The parties reached an agreement during the pre-trial conference that the main points of dispute between the parties are the quantum of maintenance for the minor children, how the joint estate should be divided and who should pay the costs of the action. In terms of the pre-trial minute the applicant waived, alternatively abrogated her perceived right to claim forfeiture in terms of s 9 of the Divorce Act.

4.3 If the amendment is allowed it will set the divorce action on a new course and necessitate the respondent to revisit a number of substantial and procedural issues that have been disposed of at great cost. It will result in significant delay in finalising the matter.

4.4 The amendment will result in severe prejudice, the nature of which cannot be off-set by a cost order.

[5] As result of the objection the applicant applies for leave to effect the amendment. The applicant explains in her affidavit in support of the application that when she first consulted her attorney the attorney considered and discussed the content of the summons with her. She advised her erstwhile attorney of the true grounds for the breakdown in the marital relationship and the respondent’s unacceptable conduct towards her. She was advised that she would need to file a plea and counterclaim which the attorney would draw based on the information supplied by the applicant during the consultation (the applicant’s instructions). Regarding the patrimonial system governing their marriage the applicant’s erstwhile attorney explained to her that where parties are married in community of property the law requires that such joint estate be divided when the marriage is dissolved. The applicant understood the division as a ‘fait accompli’. As layperson she accepted the advice of her attorney and had no reason to doubt the correctness thereof. After her current attorneys were appointed they instructed counsel and she, her attorney and counsel subsequently had a comprehensive consultation in order to oppose the division application. Pursuant to her instructions she was advised, for the first time, that she was entitled to claim forfeiture of

the patrimonial benefits of the marriage in community of property. To that end the applicant refers to the content of her answering affidavit in the division application where she gives an overview of the grounds on which she relies for an entitlement to rely on the provisions of s 9 of the Divorce Act. The applicant denies that the amendment is merely a ploy to defeat the division application, is made mala fide or that it will result in prejudice that cannot be remedied by a cost order. The applicant avers that she will be severely prejudiced if she is not granted leave to amend as her right to claim forfeiture will in effect be finally disposed of. Regarding waiver the applicant denies that her erstwhile attorney was authorised to waive or abrogate any of her rights in terms of the Divorce Act. The applicant claims that should leave to amend not be granted to her, her right to a fair trial will be adversely infringed upon.

- [6] In the answering affidavit the respondent elaborates on the grounds of objection to the proposed amendment. Save for the gist of the grounds for objection referred to above, the respondent avers that the applicant's erstwhile attorney as part of a leading law firm would have applied her mind to whether any grounds for formulating a claim for forfeiture existed and would have advised the applicant to incorporate such claim in her counterclaim, if based on her instructions, there were any prospects of success in pursuing of such claim. Regarding the pre-trial conference the respondent explains that the applicant is bound to the agreement concluded between the parties, duly represented by their attorneys, regarding the issues that would serve for determination during the trial, namely the quantum of the maintenance for the children; how the joint estate would be divided and which party must pay the costs of the action. The respondent also relies on the fact that it is not the applicant's case that her attorney acted without instructions during the pre-trial conference. It is contended by the respondent that the pre-trial conference is not without legal consequence and parties are bound to the issues delineated in the pre-trial minute. The respondent persists with the contention that the proposed amendment amounts to nothing more than a tactical ploy to defeat the division application. It is contended that an overarching approach reveals that the application to amend lacks bona fides, is without merit and will cause severe prejudice to the respondent which cannot be cured by a cost order. The respondent lastly joins issue with the allegations regarding the basis for a forfeiture claim and argues that on a balanced conspectus of objective facts the intended claim for forfeiture is ill-conceived and still-born.
- [7] This is in summary the background against which this application must be determined.
- [8] 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.[1] Our courts have for almost 90 years endorsed and followed the approach to amendments as enunciated in the matter of *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29:

“The question of amendment of pleadings has been considered in a number of English cases. See for example: Tildesley v Harper (10 ChD 393); Steward v North Met Tramways Co (16 QBD 556) and the 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 it is sought to amend was filed.”

- [9] With regards to the discretion for allowing or refusing an amendment the Appellate Division enunciated the applicable test in *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565G as follows:

“Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.”

The Chief Justice then referred to the “principles ... well summed up” in the matter of *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640 H – 641 C where it was held:

“Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.”

The Chief Justice also referred to the matter of *Krogman v Van Reenen* 1926 OPD 191 at 195:

“. . . he must show, for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the

Court and the other party to the manifold inconveniences of a postponement. . .”

- [10] The application for leave to amend must also be determined against the backdrop of the nature of civil litigation in our law. The nature of civil litigation in our adversarial system was explained by Theron JA and Wallis JA, speaking on behalf of the court in the matter of *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) par 13 as follows:

“Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence),[2] to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues.[3] That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'.[4] There are cases where the parties may expand those issues by the way in which they conduct the proceedings.[5] There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary

for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided.[6] Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.”

[11] Parties are generally limited to their pleadings.

“The object of pleading is to define the issues so as to enable the other party to know what case he has to meet. The parties are, therefore, limited to their pleadings: a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvas another. However, since pleadings are made for the court . . . it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues. . . .The general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of the matter falling outside the pleadings...”

See Farlam et al Erasmus, Superior Court Practice at B1/129 – 130; Du Toit obo Dikeni v Road Accident Fund 2016 (1) SA 367 (FB) par 43.

[12] It is highly desirable that any new issues sought to be raised by parties should be introduced prior to the commencement of the trial, in other words amendments should preferably be made before the issue is inquired into during the trial. See for instance Levenstein v Levenstein 1955 (3) SA 615 (SR).

[13] The respondent’s first ground of opposition to the application is premised on the contention that the applicant cannot resile from the pre-trial agreement where the parties, whilst both were represented by their attorneys, agreed to the limitation (the respondent preferred the reference ‘delineation of issues’) of issues that would serve for determination at the trial.

[14] The facts of this case differ from the cases referred to by the respondent.[7] The applicant seeks leave to include the claim for forfeiture so that she may rely on it during the trial. She does so well in advance of the trial. The respondent will be entitled, should he so be inclined, to persist with the defence that the applicant waived or abrogated her right to rely on the forfeiture provisions. I have my reservations regarding the contention that the applicant in this instance and on the facts of this matter waived or abrogated her right to rely on the forfeiture, but I need not determine this issue and it is best left for trial if it remains extant. In my view it does not bar the grant of leave to amend.

[15] The respondent’s second ground of opposition is premised on the contention that the application is made mala fide to pre-empt and defeat the division application which application was necessitated by the applicant’s conduct which is highly prejudicial to the respondent’s interests in the joint estate.

[16] In Frankel Pollak Vinderine Inc v Stanton NO 2000

(1) SA 425 (W) at 447G-H the court explained the concept of mala fides as follows:

“Bona fides is precisely what it says, good faith. It is a state of mind, just as is mala fides (bad faith): there can be no constructive bad faith - it cannot be imputed to a man because the law lays down certain requirements and he ought to have known them. If he was ignorant of the law or its requirements and acted in good faith, honestly (judged by the state of his mind), he was bona fide.”

Mala fides requires an inference that an improper result is intended.

[17] Such a finding is not justified by the facts of this matter.

[18] Counsel for the applicant conceded that should the amendment be granted it will pre-empt the division application. The concession was fairly made. Counsel for the respondent argued that the amendment's sole purpose is to defeat the division application at this stage whilst her conduct necessitated the application in the first place.

[19] The applicant indeed only disclosed her intention to seek an amendment to rely on forfeiture of the benefits of the marriage in community of property for the first time in her answering affidavit to the applicant's division application. She did so after the consultation with her newly appointed attorney and counsel and pursuant to the advice she received. She disclosed the intended amendment as one of the grounds of opposition to the division application, not the only ground of opposition. It is therefore

correct that the amendment is intended to pre-empt the division application. But that does not mean that an improper result is

intended, or put differently that such result would be improper. The result the applicant intends to achieve is not only to defeat the division application but also to seek forfeiture at trial. Whilst one can understand the respondent's dismay at the turn of events, it does not justify the inference of an intention to achieve an improper result. If the forfeiture is successful eventually cadit quaestio.

[20] The respondent complains of the fact that the amendment will set the divorce action on a new course and necessitate the respondent to revisit a number of substantial and procedural issues that have been disposed of at great cost. It is contended that this will result in significant delay in finalising the matter. This ground of complaint does not justify dismissal of the application in this instance. It is not clear what the substantial and procedural issues consist of that would need to be revisited. No details were advanced. As for the costs already incurred, no particulars were given, but these matters can be properly ventilated at the eventual trial. The preparation already done will obviously remain relevant.

[21] The fourth ground of objection, namely that the amendment will result in severe prejudice, the nature of which cannot be off-set by a cost order relates to the aforementioned consequences, specifically the consequences of the division application and the conduct complained of that gave rise to the division application. The applicant contends that there are remedies available i.e. an interdict should the respondent be able to make a case. There is a lot of force in the argument on behalf of the respondent, but it must be borne in mind that the allegations are seriously disputed. The costs of the division application is a matter

that can be addressed in that application.

[22] In viewing the matter holistically I am satisfied that the applicant intends to raise an issue deserving of consideration, in other words a triable issue that should be ventilated. There are no grounds necessitating the dismissal of the application. It follows that leave to amend should be granted.

[23] It remains to consider the liability for costs of the application. The applicant seeks an indulgence in the true sense of the word. The respondent's opposition was reasonable in light of the circumstances of this matter. The issues that respondent raised were not frivolous but to the contrary deserving of consideration. In my view the appropriate order would be that the applicant pays the costs of the application. Insofar as it is necessary to specify, the cost order below includes the costs of the application on opposed basis.

[24] Accordingly, IT IS ORDERED THAT:

1. Leave is granted to the applicant in terms of the provisions of Uniform rule 28(4) to amend the counterclaim in case number: 4843/2015 in accordance with the content of the applicant's notice of intention to amend dated and filed on 25 November 2016;
2. The applicant effect the amendment within 10 (TEN) days from date of this order;
3. The applicant pays the costs of the application.

N. SNELLENBURG, AJ

APPEARANCES:

On behalf of the applicant: Adv C.D. Pienaar

Instructed by:

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On behalf of the respondent: Adv W.A. Van Aswegen

Instructed by:

Mr G.H. Bradshaw

McIntyre & Van der Post

[1] Blaauwberg Meat Wholesalers CC v Anglo Dutch Meat (Export) Ltd

(2004) 1 ALL SA 129 (SCA) at 133 H – I; Picardy Hotels Ltd v Thekwini Properties (Pty) Ltd 2009

- (1) SA 49. Aslo see Rosenberg v Bitcom 1935 WLD 115 at 117 where the court already held that “Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper

ventilation of the dispute between the parties.” [2] Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972

- (1) SA 464 (D) at 469C – E. Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC)

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[2] Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972

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[3] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009

- (2) SA 277 (SCA) paras 15 and 19.

[4] Phillips and Others v National Director of Public Prosecutions [2005] ZACC 15; 2006

- (1) SA 505 (CC) para 39.

[5] Shill v Milner 1937 AD 101 at 105.

[6] CUSA v Tao Ying Metal Industries and Others [2008] ZACC 15; 2009

- (2) SA 204 (CC) para 68; Barkhuizen v Napier [2007] ZACC 5; 2007

(5) SA 323 (CC) para 39; Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd 2012

- (3) SA 531 (CC) paras 109 – 114.

[7] The respondent relies on the judgments in AJ Sheppherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk 1985

- (1) SA 39 (A) and Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) SA 106 (A). Both the referenced cases confirms the general principle that a party is to be confined to the cause on which he had relied at the trial as if he indicated in his pleading that such cause of action was his sole cause of action. Chemfos also referred to the fact that parties are bound

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