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

**CASE NO:19568/2018**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

30.08.23

In the matter between:

**B, A J**

Applicant

and

**C. T S**

Respondent

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## JUDGMENT

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**Coram NOKO J**

### ***Introduction***

[1] This is an interlocutory application for an order granting leave to amend the notice of motion. The applicant intended to add a further prayer to her notice of motion in a matter pending under the above case number. The respondent opposes the intended amendment on the basis that it is excipiable as it is without proper legal foundation.

### ***Background***

[2] The parties were married to each other, and the marriage was dissolved by this court on 29 November 2018. A settlement agreement was entered into between the parties was incorporated in the order of divorce. The settlement agreement included a clause on the maintenance of the parties' minor children. After the divorce the applicant relocated to the United Kingdom (UK) and the respondent relocated to the United States of America (USA).

[3] The applicant launched proceedings in the USA, Montgomery Circuit Court (Circuit Court) for the variation of the order relating to the maintenance of the parties' children. The Circuit Court decided not to adjudicate over the *lis* as the South African court in which the settlement agreement was made an order of court retained the power to adjudicate dispute arising for the settlement agreement. The circuit court would

however be clothed with jurisdiction if the South African court declines to exercise its jurisdiction.

[4] The applicant subsequently approached this court for an order that this court should decline jurisdiction to adjudicate the *lis* between the parties relating to the variation of the maintenance order. This was premised on the contention that both the applicant and the respondent do not reside within the jurisdiction of this court and in addition the applicant intends to call as witnesses, respondent's current husband, the banker and the children schools' functionaries all of whom are in the USA, and this may be costly. Further that it would be difficult for the court to secure attendance of such witnesses even if the subpoena would be issued.

[5] The applicant wishes to add as a prayer in the notice of motion that the adjudication in South Africa would, based on the reasons set out above, lead to unfair adjudication which is inconsistent with section 34 of the Constitution. In addition, the applicant also intended to add an alternative prayer which relates to the doctrine of effectiveness of orders granted by the courts.

#### *Issues for decision*

[6] The issue for determination is whether the applicant has made out a case for amendment of the Notice of Motion.

#### *Contentions by the parties.*

[7] As a prelude, the applicant submitted to court that the issue for this court's determination is limited to the question of the amendment and the court need not decide the merits of the main application. Counsel for the applicant submitted that amendment of summons should always be allowed except in instances where *mala fides* can be shown and further that the respondent cannot be compensated by a cost order. In addition, so continued the applicant's counsel, the court always retains the discretion whether to grant leave to amend.

[8] The applicant submitted that the principles with the regard to amendment have been solidified. The said principles were summed up as follows, first, the amendment must be allowed if it may not cause injustice to the other party which may not be compensated by an order as to costs. Secondly, the application for the amendment should not be *mala fide*. Third, the amendment would be allowed in certain instances even if it introduces a new cause of action or has the effect of changing the character of the proceedings and necessitating<sup>1</sup> the reopening of the case for fresh evidence to be led if it is necessary to determine the real issue between the parties.

[9] The applicant contended further that on a proper interpretation of section 34 the party should be able to "... *secure the inexpensive and expeditious completion of litigation before the courts: ... Consequently, the rules should be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible.*"<sup>2</sup>

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<sup>1</sup> See Applicant's Head of Argument at para 3.12, CaseLines 012-50.

<sup>2</sup> *Ibid* at para 2.27 where reference was made of the judgment of the Constitutional Court in *Eke v Parsons*, 2016 (3) SA 37 (CC) where it was stated that rules of court have two objects namely, to ensure

[10] The applicant's counsel noted further that the amendment will not lead to a need to supplement the founding affidavit as the basis thereof are already canvassed in the founding affidavit. The applicant appears not to take issue with the respondent supplementing his papers after the amendment.

[11] The respondent on the other hand contends that the amendment is objected to on the basis that it does not disclose a cause of action and is excipiable. First, it appears that the doctrine of effectiveness (applicant's alternative argument) appears to have been misconstrued by the applicant since the available authorities states that such a principle would be invoked where there is a need to establish jurisdiction *ab initio*. As a result, the date of commencement of the proceedings is the critical date. In this instance jurisdiction has already been established. This contention, so went the argument, is unsustainable.

[12] The counsel for the respondent further contended that the provisions of section 34 of the constitution seems to be against the applicant as it protects the right of parties to be given an opportunity to present their cases before the courts. If the applicant seeks not to exercise her rights in court in South Africa the courts may be found to have denied the respondent a right to have *lis* adjudicated in the South African courts which is inconsistent with the provision of section 34. In any event section 34 is invoked for the purpose of accessing the courts and not to request the contrary.

[13] The respondent has stated in the answering affidavit that “[I] noticed that the applicant states that if the amendment is to be granted, that this will effectively reopen

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a fair trial or hearing and to secure an inexpensive and expeditious completion of litigation and to further the administration of justice.

*the pleadings and allow for me to file a further answering affidavit. If that is the applicant's attitude, then I do not persist in the objection to the amendment on the basis that it was not relied upon in the founding affidavit, either properly or at all.*"<sup>3</sup>

[14] I noted that this issue was not comprehensively addressed by the parties during argument, but nothing suggests that the respondent has disavowed that stance. The essence of the statement is that the respondent should be allowed to supplement the papers and if this is conceded then there is no objection to the proposed amendment. It would naturally follow that once the amendment is granted the opponent would be given the opportunity to supplement the papers. Now that the applicant does not suggest that the respondent should be refused an opportunity to supplement the papers then subject to what set out below the parties agree that the amendment be effected and respondent be allowed to supplement.

[15] The application to include right to access to courts as contemplated in section 34 of the constitution appears not to have been raised in the context as presented by the applicant before and the court may not restrict a party from raising same on the basis that it was not raised before. The court may also have to consider whether injustice will visit the parties if the jurisdiction is rejected. The question would be whether it would be in the interest of the children so to do. It does not appear that the applicant harbours malice against the respondent which tainted the amendment application, and this does not in any way mean to delve into the merits of the main application.

[16] The respondent did not make averments from which it could be deduced that if the amendment is allowed, he will be visited by prejudice which cannot be compensated

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<sup>3</sup> Caselines 012-29 on the 4<sup>th</sup> paragraph.

by an order as to costs. The only concern appears to be that the respondent be allowed to supplement.

### Costs

[17] The parties could have settled the matter after the answering affidavit where it was stated that amendment would be allowed if respondent is allowed to file supplementary papers and there would have been a need to approach court and incur the costs. In the premises there is no basis why each party should not pay their respective legal costs.

[18] Wherefore I am making the following:

1. The amendment as set out in the notice of amend is granted.
2. The respondent is permitted to supplement his papers within 10 days of service of the amendment.
3. Each party to pay their respective legal costs.

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Mokate Victor Noko  
Judge of the High Court of South Africa  
Gauteng Local Division, Johannesburg.

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 31 August 2023.

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Date of hearing:

17 July 2023

Date of judgment:

30 August 2023