IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1770/2020

In the matter between:

EAST LONDON JEWISH HELPING HAND AND BURIAL SOCIETY (ALSO KNOWN AS THE EAST LONDON CHEVRA KADISHA) **Applicant**

and

CHANOCH GALPERIN **First Respondent**

THE JEWISH ECCLESIATICAL COURT (ALSO KNOWN AS THE BETH DIN OF JOHANNESBURG) **Second Respondent**

GIDEON FOX N.O. **Third Respondent**

YOEL SMITH N.O. **Fourth Respondent**

THE MASTER OF THE HIGH COURT, GRAHAMSTOWN **Fifth Respondent**

JUDGMENT

LAING AJ:

[1] This matter concerns an application for, *inter alia*, leave to: (a) amend the notice of motion to a counter-application; and (b) deliver a supplementary founding affidavit thereto. For the sake of convenience this shall be referred to as 'the application to amend'.

[2] It also concerns an application for, *inter alia*, the joinder of various parties to the above counter-application. This shall be referred to as the 'joinder application'.

[3] A convoluted and bitter dispute lies behind this matter and at its heart is the validity of a will left by a member of the Jewish community in East London, the late Mr Israel Bayer. A summarized chronology of the dispute follows.

Background of the dispute

[4] On 18 October 2017, Mr Bayer executed a will in terms of which he bequeathed one-third (⅓) of his estate to the East London Jewish Helping Hand and Burial Society, also known as the East London Chevra Kadisha. The latter is the applicant in this matter and shall be referred to as 'the Society'. It is a public benefit organization that was established to look after and protect the welfare of members of the Jewish community.[1]

[5] Some five months later, on 22 March 2018, Mr Bayer executed a further will. In terms thereof, he revoked all previous wills and appointed Rabbi Chanoch Galperin as the executor of his estate. The latter is the first respondent in this matter and shall be referred to as 'Rabbi Galperin' from hereon. Pertinently, Mr Bayer bequeathed one-third (⅓) of his estate to Rabbi Galperin, instead of the Society, as he had done previously.

[6] Mr Bayer passed away on 5 December 2018.

[7] Subsequently, the Society obtained a copy of the later will and became suspicious of its validity, contending that Rabbi Galperin had prepared a portion of the will himself and had forged Mr Bayer's signature, and that the execution thereof had not been properly witnessed. This resulted in a dispute between the Society and Rabbi Galperin, which was

[1] See the uncontested description of the applicant that appears in paragraph 23 of the founding affidavit of Mr Gary Stirk, in support of the application to amend (at p 30 of the relevant bundle).

referred to the Jewish Ecclesiastical Court, also known as the Beth Din of Johannesburg, for determination.[2]

[8] On 25 September 2019, the Beth Din rejected the Society's claims.

[9] Unhappy with the outcome, the Society brought an application on 7 July 2020 under Case No. 1356/2020 for an order declaring the later will to be invalid and to be set aside. This shall be referred to as 'the invalidity application'. The Society withdrew the invalidity application on 19 August 2020, ostensibly for procedural reasons.

[10] About a week later, on 27 August 2020, Rabbi Galperin brought an application under Case No. 1770/2020 for an order directing that the findings of the Beth Din be made an order of court.[3] This shall be referred to as 'the main application'.

[11] On 2 October 2020, the Society took a number of procedural steps. The Society and other respondents delivered their answering affidavit to the main application. The Society also delivered a counter-application, seeking the review and setting aside of the findings of the Beth Din, the setting aside of the arbitration agreement that governed the Beth Din proceedings,[4] alternatively the submission of the dispute to a new arbitration tribunal. Importantly, the Society described this as a 'conditional counter-application' in the heading of the notice of motion and at several other places therein. Reference is also made to a 'conditional counter-application' in the founding affidavit of the President of the Society, Mr Louis Robinson, particularly at paragraph 11 where he explains as follows:

> "Furthermore, and as fully stated above, this counter-application is conditional in the sense that it has only been brought in the event of the above Honourable Court refusing to uphold the defences relied upon in the answering affidavit, more particularly the point *in limine* and the main defences. More particularly it is being brought in the event of the above

[2] The Society denies that it was a party to the proceedings before the Beth Din, as apparent from its replication to Rabbi Galperin's special plea and plea in the action proceedings brought in terms of Case No. 2067/2020. See sub-paragraphs 1.6.1. to 1.6.3. thereof (at p 108 of the relevant bundle). This will need to be determined separately.
[3] In his application, Rabbi Galperin refers to the findings of the Beth Din as an 'arbitral award'. The parties in this matter appear to agree that the findings fall under the ambit of the Arbitration Act 42 of 1965.
[4] The Society sought, in the alternative, an order directing that the dispute described in the arbitration agreement not be referred to arbitration.

> Honourable Court finding that the arbitration agreement annexed to the answering affidavit as "LR26" constitutes the written agreement entered into between the applicant as claimant and the first respondent as the respondent."

[12] The insertion of the word, 'conditional', eventually created implications for the parties, which will be discussed further. However, for immediate purposes, this shall be referred to simply as 'the counter-application'.

[13] The Society also brought an application for the joinder of the Beth Din as well as Rabbi Gideon Fox and Rabbi Yoel Smith, in their capacities as representatives of the Beth Din.[5] This is 'the joinder application', as mentioned previously.

[14] On the same date, the Society instituted an action under Case No. 2067/2020 for an order, *inter alia*, that the later will be declared invalid and be set aside and for the earlier will to be declared valid and to be accepted as such by the Master of the High Court.[6] This shall be referred to as 'the main action'.

[15] Rabbi Galperin withdrew the main application on 17 November 2020. He delivered his special plea and plea over to the main action on 23 November 2020. In terms of his special plea, he argued that the Beth Din had already adjudicated the Society's claim, to finality. Furthermore, he admitted in his plea that his wife, Mrs Sara Galperin, had prepared a portion of the later will. On the same date, he delivered his claim in reconvention to the main action, seeking an order declaring him to be competent to be appointed as executor and for him to inherit one-third (⅓) of the late Mr Bayer's estate.

[16] The parties exchanged additional pleadings in the main action before the Society gave notice, on 9 July 2021, of its intention to amend the counter-application 'by deleting the word "conditional" wheresoever it appears in the heading and body of thereof [sic].' Consequently, Rabbi Galperin delivered notice of his objection to the intended

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[5] Rabbi Fox and Rabbi Smith presided over the proceedings before the Beth Din on 19 September 2019 and made the findings that form the subject of the counter-application.

[6] In the alternative, the Society sought an order declaring that Rabbi Galperin be disqualified from receiving any benefit in terms of the later will.

amendment on 15 July 2021, which prompted the Society to bring the present application to amend on 29 July 2021.

[17] The last date in this chronology is 25 August 2021, which is when Rabbi Galperin delivered his notice in terms of sub-rule 6(5)(d)(iii), raising various questions of law with regard to the joinder application.

The Society's case

[18] In its answering affidavit to the main application, the Society listed a number of defences, viz. it was not a party to the arbitration agreement, it never agreed to an arbitration process under the auspices of the Beth Din and is therefore not bound by its findings, the arbitration agreement was *contra bonos mores*, arbitration in the circumstances was excluded by statute, the arbitration agreement was void for vagueness, and the findings of the Beth Din should be reviewed and set aside. Moreover, the Society indicated that if the above defences failed then it intended to proceed with the counter-application for the review and setting aside of the above findings. This was the reason why the Society described its counter-application as conditional.

[19] Rabbi Galperin's withdrawal of the main application meant that the Society's defences were never adjudicated. Notwithstanding, the Society contends that its counter-application remains extant.

[20] In his special plea, Rabbi Galperin argues that the Beth Din has already adjudicated the Society's claim, to finality. Accordingly, the main action ought to be dismissed, alternatively it should be stayed, pending the Beth Din's final determination of the dispute. To this, the Society delivered a replication that listed all the defences relied upon with regard to the main application. It also asserted that the counter-claim was still pending and that, in the event that the defences to the special plea were not upheld, the special plea should be stayed, pending the final determination of the counter-application.

[21] Rabbi Galperin previously admitted that the counter-application was still pending.[7] However, he contended otherwise in an unrelated set of proceedings involving the East London Hebrew Congregation. This was the cause for the Society's notice of its intention to amend its counter-claim by the deletion of any reference to the word, 'conditional', thereby rendering it unconditional.

[22] The Society argues that there will be no prejudice to Rabbi Galperin should the application to amend be granted. If not, then the Society would have to bring a new application, at substantial cost to all parties involved.

[23] Furthermore, the Society seeks leave to deliver a supplementary founding affidavit for the counter-application. It explains that it is necessary to do so by reason of Rabbi Galperin's withdrawal of the main application, his special plea to the effect that the Beth Din has already adjudicated the Society's claim, and the Society's replication that, in the event that its defences fail, the special plea should be stayed, pending the outcome of the counter-application.

[24] Similarly, argues the Society, there will be no prejudice to Rabbi Galperin as he has not yet delivered an answering affidavit to the counter-application.

[25] Finally, the Society seeks leave to join Rabbi Fox and Rabbi Smith by reason of their having a direct and substantial interest in the counter-application.

Rabbi Galperin's case

[26] The procedural point taken by Rabbi Galperin is that the amendments that the Society seeks to make are not those described in its notice of intention to amend. The Society has applied for leave to make amendments that are different to the ones that were sought originally and to which objection was previously made.

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[7] The Society sought an admission from Rabbi Galperin, under its notice in terms of sub-rule 37(4), that the counter-application was still pending. To this, Rabbi Galperin responded 'yes'. See sub-paragraph 8.7. at pp 164 and 170 of the relevant bundle.

[27] Moreover, Rabbi Galperin points out that the Society brought the counter-application on a purely conditional basis, i.e. in the event that its defences to the main application failed. Furthermore, the founding affidavit in the counter-application incorporated averments made in the answering affidavit to the main application, meaning that the main application and the counter-application are inextricably linked. Consequent to Rabbi Galperin's withdrawal of the main application, the court is no longer required to adjudicate the Society's defences. The counter-application, being predicated upon the adjudication of the main application, must fall away.

[28] Rabbi Galperin argues that the Society seeks to convert a conditional counter-application into a stand-alone application. The main difficulty that the Society has is that the counter-application is no longer extant.

[29] Finally, Rabbi Galperin contends that the application to amend constitutes an abuse of process: the Society has failed to follow the procedure required in terms of rule 28, and has failed to take any further steps with regard to the counter-application for some eight months after the main application was withdrawn. From this, the inference to be drawn is that the Society seeks to have issues adjudicated in a piecemeal fashion before different forums.

[30] Before considering the issues at hand, it is necessary to mention, too, that Rabbi Galperin seeks the striking out of any mention of the word, 'disingenuous', in the Society's founding affidavit, where it is used with reference to Rabbi Galperin or his attorney.

Issues to be decided

[31] The first issue is whether the Society has established a basis upon which the court can grant leave to amend its notice of motion in the counter-application and to deliver a supplementary founding affidavit.

[32] The second issue is whether the Society has made a case for the joinder of the Beth Din as well as Rabbi Fox and Rabbi Smith.

[33] The remaining issue are ancillary to the above and pertain to the striking out of vexatious or scandalous material, as described by Rabbi Galperin, and the determination of costs.

Legal framework

[34] The provisions of rule 28 govern amendments to pleadings and documents. The court enjoys a discretion as to whether or not to grant an amendment, the main objective of which being to ensure the proper ventilation of a dispute, to determine the real issues between them, so that justice can be done. See the commentary in DE van Loggerenberg, *Erasmus- Superior Court Practice* (2nd edition, service 10, 2019), at D1-331.[8]

[35] The general principle, as stated by Watermeyer J in *Moolman v Estate Moolman* 1927 CPD 27, at 29, is that:

> "[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."

[36] Subsequently, Selikowitz J held, in *Benjamin v Sobac South African Building and Construction (Pty)* Ltd 1989 (4) SA 940 (C), at 958B, that:

> "[w]here a proposed amendment will not contribute to the issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not to be granted. To grant such amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expend both time and money in dealing with an issue, the resolution of which may satisfy the needs (or curiosity) of the party promoting it, but which will not contribute towards the adjudication of the genuine dispute between the parties."[9]

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[8] See, too, *Cross v Ferreira* 1950 (3) SA 443 (C), at 447, and the line of cases that followed, including *YB v SB* 2016 (1) SA 47 (WCC), at 51C-D.

[9] The principles for granting or refusing amendments were usefully summarised in *Commercial Union Assurance Co Ltd v Waymark NO* [1995] 4 All SA 48 (Tk), where the *Benjamin* case is mentioned.

[37] More recently, the Constitutional Court observed in *Affordable Medicines Trust and others v Minister of Health, RSA and another* [2005] JOL 13932 (CC), at [9],[10] that the principles for granting or refusing amendments apply equally to a notice of motion. The question to be decided in each case was what the interests of justice demanded.

[38] The above principles constitute the basic legal framework into which the present matter falls. How the principles ought to be applied will be explored further, below.

Discussion

Application to amend

[39] In relation to Rabbi Galperin's procedural point, it can well be argued that the Society seeks leave to make amendments that were not originally described in its notice of intention to amend. Initially, it indicated its intention to delete the word, 'conditional', wherever it appeared in 'the heading and body' of the counter-application. As a result of Rabbi Galperin's opposition, the Society then made application for leave to amend the notice of motion for the counter-application 'in the respects set out in its notice of intention to amend' *and* for leave to deliver a supplementary founding affidavit.

[40] Whereas there may have been ambiguity in what meaning was to have been given to 'the heading and body',[11] this was removed when the application to amend was delivered, where the Society specifically confines the desired amendment to the notice of motion for the counter-application. The proper meaning of the notice of intention to amend then became apparent.

[41] The complaint that the Society's seeking leave to deliver a supplementary founding affidavit was not foreshadowed in the notice of amendment is understandable to a degree.

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[10] Also reported by Juta as *Affordable Medicines Trust and others v Minister of Health, RSA and another* 2006 (3) SA 247 (CC).

[11] The question arises as to whether the Society intended to amend the notice of motion and the founding affidavit itself. It is trite, as counsel for Rabbi Galperin points out in his heads of argument, that it is impermissible to amend an affidavit. See, too, the provisions of sub-rule 28(1) to that effect.

However, a distinction must be drawn between an application brought in terms of sub-rule 28(4) for leave to amend and a standard application brought for leave to file a further (or supplementary) affidavit. The Society has not purported to rely on sub-rule 28(4) with regard to the delivery of its supplementary founding affidavit, it simply seeks leave under the same application for such purposes.[12] Rabbi Galperin has incorrectly conflated the two procedures. There is no reason why the Society could not have applied for leave to deliver the above affidavit under the same application.

[42] If the Society had indeed failed to comply with the provisions of rule 28 then it was always open to Rabbi Galperin to have invoked the provisions of rule 30 to address such irregular proceedings. This was never done.

[43] In the end, nothing turns on the point.

[44] Much has been made of the conditionality of the counter-application and the extent to which it is linked to the main application, since withdrawn. As a starting point, sub-rule 6(7)(a) permits any party to any application proceedings to bring a counter-application.

[45] In *Law Society of the Northern Provinces and others v Ronald Bobroff & Partners Inc and others* [2015] 4 All SA 347 (GP), Murphy J held, at [38], that:

> "…Nothing in rule 6(7)(a) qualifies the right of the applicants, cited by the Law Society as parties in its application, to bring a counter-application to its application; and there is equally nothing necessitating any counter-application to be of the same character as the application…"

[46] The above case is authority for the principle that nothing prevents a litigant from bringing a counter-application to obtain relief that is wider or not connected to that sought in a main application.[13]

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[12] The Society expressly disavows reliance on rule 28 to amend its founding affidavit in the counter-application. This is apparent from paragraphs 41 and 57 – 58 of Mr Stirk's founding affidavit for the application to amend. See, too, counsel's heads of argument in that regard.

[13] DE van Loggerenberg, *Erasmus- Superior Court Practice*, at D1-81.

[47] Rabbi Galperin sought, in the main application, an order directing that the findings of the Beth Din be made an order of court. In its counter-application, the Society seeks the review and setting aside of the findings of the Beth Din, the setting aside of the arbitration agreement that governed the Beth Din proceedings, alternatively the submission of the dispute to a new arbitration tribunal. The relief sought in the counter-claim is distinguishable from and more expansive than that sought in the main application. It stands to reason that the withdrawal of the main application, *per se*, does not mean that the counter-application ceased to be extant. The issues contemplated in the counter-application remain very much alive.

[48] The fact that the counter-application was brought conditionally does not necessarily mean that it fell away upon the withdrawal of the main application. The Society indicated that it was conditional upon the court's refusing to uphold the defences set out in the Society's answering affidavit. The court never adjudicated the Society's defences. They survived the above withdrawal inasmuch as they appear in the replication to Rabbi Galperin's special plea under Case No. 2067/2020 (the main action). The Society wishes to proceed with the counter-application in the event that the above defences fail. When viewed within the context of the still unresolved dispute between the parties, the conditionality originally attached to the counter-application is of no real consequence. If anything, then recognition of the continued existence of the counter-claim might assist in permitting the proper ventilation of the dispute and the determination of the real issues, irrespective of the fact that the main application has been withdrawn.

[49] At this point, it is necessary to turn to the Chief Rabbi's argument that because the founding affidavit in the counter-application incorporated averments made in the answering affidavit to the main application, the two are inextricably linked. In other words, the fate of one decides the fate of the other.

[50] In the Society's founding affidavit, Mr Robinson states as follows, at paragraph 16:

> "[t]he relevant paragraphs in the answering affidavit which are pertinent to the counter-application are those set out in paragraphs 8 to 102 of the answering affidavit deposed to

> by myself and I pray that all the aforesaid paragraphs be read as if specifically incorporated herein."[14]

[51] The paragraphs in question trace the history of the dispute between the parties. This begins in June 2016 with the employment of Rabbi Galperin by the East London Hebrew Congregation and traverses the interaction between the honorary treasurer and secretary of the Society, a Ms Ellen Ettinger, and the late Mr Bayer; contact with Drake, Flemmer & Orsmond Attorneys, representing the executor; the meeting with Ms Ettinger, Mr Robinson, Rabbi Galperin, and the co-president of the East London Hebrew Congregation, a Mr Bernie Aufrichtig; the launching of the invalidity application; communication between Bax Kaplan Russell Inc, representing Rabbi Galperin at the time, and an attorney, Mr Derek Puchert; the execution of the later will; the appointment of 'a forensic examiner and questioned document expert',[15] a certain Mr Cecil Greenfield; the circumstances that led to the Beth Din proceedings; and the continuation of the dispute, notwithstanding the Beth Din's decision.

[52] All in all, the 94 paragraphs that cover the history of the dispute fill 43 pages of the answering affidavit. They are substantiated by some 38 annexures and set out, in considerable detail, the conduct of the parties and the events that ultimately culminated in the Beth Din's findings. There is nothing, on the face of it, to prevent the Society from incorporating by reference the relevant paragraphs of its answering affidavit in the main application into the founding affidavit for its counter-application. Pertinently, it does so to avoid prolixity.[16]

[53] In *Wildlife and Environment Society of SA v MEC for Economic Affairs, Environment and Tourism, EC Provincial Government and others* [2005] 3 All SA 389 (E), Pickering J held, at 394b-d, that:

> "[w]here, as in the present application, an applicant which has withdrawn its application wishes to make reference to averments contained in the affidavits filed in the main application, in substantiation of its contention that in bringing the application it acted

[14] The heading for paragraph 16 is clear. It reads 'Relevant paragraphs in the answering affidavit'.
[15] This is the description provided in paragraph 39 of Mr Robinson's answering affidavit.
[16] See paragraph 10 of Mr Robinson's founding affidavit.

> reasonably, there is, in my view, no reason in law or in logic why it should not be permitted to do so. To require of such an applicant that it extract from the mass of papers filed of record the relevant factual averments pertaining to the reasonableness of its actions, and that it then file a further affidavit setting out yet again such averments, would lead to an unnecessary duplication of costs apart from being an exercise in empty formalism. Furthermore, it may be extremely difficult, if not impossible, in a particular case, for the court to assess the reasonableness or otherwise of an applicant's conduct in launching an application where the evidence in that regard is taken out of the context of the application as a whole."

[54] It is clear that a party in the position of the Society is not prevented from relying on averments made in an affidavit forming part of the record for an application that has been withdrawn. The affidavit in question does not simply become *pro non scripto*. To incorporate, by reference, the relevant paragraphs in a further affidavit may indeed be preferable where such an approach will facilitate the more efficient conduct and adjudication of the matter.

[55] However, the limits of the above approach cannot be ignored. The averments made in an answering affidavit are made for purposes of opposing the relief sought in terms of the application itself. The context of such averments may not readily allow their unqualified incorporation by reference into an affidavit intended for other purposes. There may be some averments that are entirely relevant to the other application, there may be some averments that are entirely irrelevant, and there may be some averments that fall somewhere in between and require further explanation.

[56] In *Pearson and Hutton, NNO v Hitzeroth and others* [1967] 4 All SA 67 (E), Addleson J observed, at 70, that:

> "…I have difficulty in understanding how the evidence led on the preliminary issue of *locus standi* could be used as evidence in proof of the substantive claims. That evidence was led specifically on the issues *in limine* and counsel were not able to suggest a basis upon which it could be made evidence in the proposed proceedings in which the respondents apparently intend to claim rights of servitude against the applicants…
>
> As stated above, the existing affidavits of the respondents were filed in opposition to the applicants' main claims. Such affidavits do, it is true, deal with certain of the facts which

> might relate to proof of the respondents' own claims over the property; but they are essentially opposing affidavits and, in order to be understood, must be read with the applicants' petition. Moreover, these affidavits of the respondents join issue on, and deal with, a number of matters in the petition which are irrelevant to any claim which the respondents may now wish to establish. To allow them to proceed by supplementing those affidavits with further affidavits seems to me in the present circumstances to be a highly cumbersome and undesirable course which does not commend itself to me as a ground for exercising my discretion in favour of the respondents. Nor, as far as the respondents' last submission is concerned, am I satisfied that such procedure would involve less cost than motion proceedings commenced *de novo*. I am by no means persuaded that the filing of supplementary affidavits would not involve considerable perusal and cross-checking of the evidence and documents already filed, which might add substantially to the costs."

[57] Similar factors operate in the present matter. If leave is granted for the amendment to be made, thereby rendering the counter-application unconditional, and if leave is granted for the delivery of a supplementary founding affidavit, then an already cumbersome counter-application that requires the respondents to peruse, check and cross-check the averments made in the answering affidavit to the main application, as well as the pleadings filed in the main action, will also require the respondents to deal with the supplementary founding affidavit and its implications.

[58] Of some concern is that the Society explains in the above affidavit that it deals with *new* facts that were not known when the founding affidavit was deposed to. Significantly, the Society was unaware at the time that it was Mrs Galperin who drew up the later will.[17] The question of who prepared and signed the later will is a key issue in the dispute and it formed the subject of the proceedings before the Beth Din. It would be difficult to deny that the 'new facts' alleged by the Society and the recent disclosure of Mrs Galperin's involvement have the potential to cast a distinctly different light on the original averments contained in the Society's answering affidavit. For that matter, the Society may well have framed the above averments otherwise had those facts previously been within its knowledge. To permit such averments to serve, unqualified, as the basis for an extensive counter-application is far from satisfactory.

[17] See paragraph 10 of Mr Robinson's supplementary founding affidavit, annexed as 'NOM1' to the application to amend, at p 22 of the relevant bundle.

[59] Ultimately, if the joinder application is granted, which this court would be inclined to do by reason of the direct and substantial interest that the Beth Din, Rabbi Fox and Rabbi Smith have in the matter, thereby necessitating further sets of answering papers, then the counter-application simply becomes unmanageable. Rather than encourage the proper ventilation of the dispute, it would attract the risk that the real issues between the parties are suffocated by an increasingly weighty set of allegations and argument that would more conveniently be dealt with under the main action.

[60] Returning to Rabbi Galperin's argument, the conditionality of the counter-claim is not so much the problem as the closeness of the connection between the counter-application and the main application. Although they may not be so inextricably linked that the withdrawal of the latter resulted in the demise of the former, the degree to which the founding affidavit in the counter-claim depends on the answering affidavit in the main application gives rise to the difficulties already discussed.

[61] Insofar as the Society still intends to seek an order for the review and setting aside of the findings of the Beth Din, the setting aside of the arbitration agreement that governed the Beth Din proceedings, alternatively the submission of the dispute to a new arbitration tribunal, all in the event that its defences to the special plea in the main action fail, it would be far better to do so *de novo*, in terms of a separate application altogether. The use of the amended counter-application as the means by which to pursue such intention would not permit the efficient conduct and adjudication of the issues in question.

[62] As an aside, whether it is desirable to permit the same or similar issues to be determined in separate proceedings between the same parties, as alluded to by Lowe J in his decision on the application for postponement of the main action, under Case No. 2067/2020, is something that must still be considered.[18] A single, consolidated set of proceedings would seem preferable.

[18] The difficulties are discussed at [110] to [125] of Lowe J's decision, where he remarked, at [124], in relation to the basis for the postponement, that '[i]t seems to me that the real issue is this dual proceeding, action and counter-application and their very obvious overlap.'

Joinder application

[63] There can be little doubt that the Beth Din, Rabbi Fox and Rabbi Smith have a direct and substantial interest in this matter by reason of the nature of the relief sought by the Society in terms of its counter-application. However, the real question is whether the parties should rather be cited as respondents in a separate application to be brought by the Society *de novo*, as this court has already intimated, or whether they ought to be joined to the main action itself.

[64] It would serve no purpose to join the parties to the counter-application for reasons allied to those already discussed. The nature of the resulting counter-application, requiring the perusal, checking and cross-checking of an overwhelming host of averments, some relevant, others not, yet others falling somewhere in between, while managing at the same time the added complications caused by the supplementary founding affidavit, would render the matter too cumbersome and unwieldy to be conducted and adjudicated efficiently.

[65] It may yet be less costly for the Society simply to bring a separate application altogether for the relief that it seeks, citing all interested parties, without losing sight of the preference to have the dispute decided under a single, consolidated set of proceedings.

Striking out

[66] Rabbi Galperin sought the striking out of all averments in the Society's founding affidavit where it described Rabbi Galperin as disingenuous. The ordinary meaning of the word is 'not candid or sincere, especially in pretending that one knows less about something than one really does.'[19] This is hardly the worst epithet that can be attributed to a litigant or his or her legal representative.

[19] J Pearsall (ed), *The Concise Oxford Dictionary* (Oxford University Press, tenth edition, revised), at 411.

[67] Viewed within the context of the mutual acrimony that has characterized the dispute, the court is not prepared to make a finding that the averments in question are scandalous or vexatious. There is no convincing indication at all from Rabbi Galperin's answering affidavit or arguments that he will suffer prejudice in the event that the averments are permitted to stand.

[68] Overall, counsel for Rabbi Galperin did not insist on pursuing the point. No relief in that regard is required.

Relief

[69] In the old authority of *Whittaker v Roos and another; Morant v Roos and another* 1911 TPD 1092, Wessels J stated, at 1102, that:

> "This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties."

[70] To grant leave for the amendment to be made to the notice of motion for the counter-application and for a supplementary founding affidavit to be delivered would invite the increasing over-complication of the dispute as a whole. What was originally a comprehensive response to the main application, subsequently withdrawn, would be required to serve as the platform for a counter-application that is distinguishable from and more expansive than the nature of the main application. The affidavits in question are too closely connected to allow for the efficient conduct and adjudication of the real issues

between the parties under a refurbished counter-application, such as the Society seeks to do. Although not an impossible task, to attempt to achieve this would be to the prejudice of Rabbi Galperin. Similarly, it would be to the prejudice of the Beth Din, Rabbi Fox and Rabbi Smith, were they to be joined.

[71] For the above reasons, the court is not convinced that it would be in the interests of justice to exercise its discretion in favour of the Society. It is not prepared to grant leave either for the amendment of the notice of motion to the Society's counter-application or the delivery of a supplementary founding affidavit thereto. In addition, it is not prepared to grant the application for joinder.

[72] Consequently, the only issue remaining is that of costs. For both the application to amend and the joinder application, there is no reason why costs should not follow the result on a party-and-party scale. However, as a whole, the issues in the present matter are not such that the costs of two counsel are justified.

Order

[73] The following order is made:

(a) the application to amend is dismissed with costs; and

(b) the joinder application is dismissed with costs.

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JGA LAING

Acting Judge of the High Court

APPEARANCE:

For the applicant:	Adv S Pincus SC, instructed by Whitesides Attorneys, Grahamstown.
For the first respondent:	Adv IJ Smuts SC with Adv Miller, instructed by Wheeldon Rushmere and Cole Inc., Grahamstown.
Date of hearing:	11 November 2021.
Date of delivery of judgment:	02 December 2021