

REPUBLIC OF SOUTH AFRICA



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

Case Number: 10942/2021

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

29 Oct 2024

DATE

SIGNATURE

In the matter between:

SONTO REBECCA NZILWANE

Applicant

and

PASSENGER AGENCY OF SOUTH AFRICA

Respondent

JUDGMENT

Badenhorst AJ:

- [1] On 4 March 2021 the applicant, as plaintiff, issued summons against the defendant for damages she allegedly suffered when she fell from a passenger train operated by the defendant.

- [2] On 11 October 2023 the plaintiff filed a notice of her intention to amend her claim in certain respects. The amendments for which application is made are reflected in the following table comparative table:

CURRENT PLEADING	PROPOSED AMENDMENT
4. On or about 2nd day of October 2019, during the early hours of the day (morning pick/rush hour) at Birchleigh train station [which is within the jurisdiction of the above Honorable Court] an accident occurred, the facts of which are as follows: - 4.1 The Plaintiff was in possession of a valid train ticket allowing her to travel by means of a train and or to use services of a train as his mode of transport. 4.2 The Plaintiff boarded a train at Katlehong train station which train was heading to Birchleigh train station.	By amending sub-paragraph 4.2 to read as follows: <i>The Plaintiff boarded a train at Kwesine train station which was heading to Germiston train station. In Germiston she changed trains and boarded a Pretoria bound train en route to her place of work at in Birchleigh.</i>
4.3. When the train took off from Katlehong train station at the platform, the doors [particularly on "the couch in which the Plaintiff embarked on] were open/did not close at all.	By replacing the name Katlehong with Germiston in Paragraph 4.3 and further correcting the spelling of coach on the same paragraph.
4.4 Inside the couch, the train became overcrowded as it was still within pick hour-time whereby most people use services of the train to travel to their workplace or for some different reasons and as it passed various train station, commuters were boarding some disembarking on the train.	By correcting the spelling of the words peak and coach respectively in paragraph 4.4. By further deleting the phrase: 'or for some different reasons' on the same paragraph.
4.5 As the train entered the station at Birchleigh train station and whilst the said train was still in motion, commuters who were impatient started pushing/shoving other commuters in an attempt to make their way closer to the door of the train or some even attempting to disembark while the train was in motion.	
4.6 During that process of shoving amongst Commuters; the plaintiff was unfortunately pushed out of the moving train and as a result the plaintiff sustained serious bodily injuries.	By amending paragraph 4.6 to read as follows: <i>'During the process of pushing and shoving among commuters, the Plaintiff was pushed and fell out of the moving train. She landed on the platform and sustained serious bodily injuries.'</i>

CURRENT PLEADING	PROPOSED AMENDMENT
	By inserting a new paragraph after paragraph 4.6 which new paragraph will be the new Paragraph 4.7 which will read as follows: <i>'At that point when the train reached Birchleigh, it was overcrowded having began to be overcrowded upon reaching Kempton Park train station.'</i>
4.7 The nature and extent of the said injuries sustained by the Plaintiff seem to be permanent in nature and will be detailed below;	
8.1 AD DRIVER 81.1 (sic) He or she allowed the train to be in motion without ensuring that all the doors were closed and locked;	
8.1.2 He or she allowed the train to be overloaded, with passengers or commuters thereby compromising the life of the commuters including that of the minor child;	By replacing the word overloaded with overcrowded in sub-paragraph 8.1.2.
8.1.3 he/she failed to keep a proper lookout or any adequate look out before setting the train in motion;	By adding the following phrase at the end of sub-paragraph 8.1.3: <i>'and by also ensuring that all train doors are closed before setting it in motion'.</i>
8.1.4 He/she failed to prevent the accident when with th exercise of due and reasonable care, he or she should have done;	
8.1.5 he/she set the train in motion without getting a signal from the train conductor and same was done meanwhile it was still chaotic inside the train and in the Platform;	By amending sub-paragraph 8.1.5 to read as follows: <i>'He/she set the train in motion while the doors were open and the coaches were visibly overcrowded'.</i>
8.1 .6 Or any other ground which may be proven during the cause of trial.	By deleting sub-paragraph 8.1.6 in its entirety.
8.2 AD CONDUCTOR AND/OR TICKET EXAMINER AND/OR THE GUARD AND/OR THE DEFENDANT 8.2.1 He/or she or they failed to have due regards to the prevailing conditions inside the train or at the Platform;	

CURRENT PLEADING	PROPOSED AMENDMENT
8.2.2 He/she/they allowed the t rain to commence moving without ensuring that all commuters have alighted :	By amending sub-paragraph 8.2.2 to read as follows: <i>'He/she or they failed to have and keep a proper lookout around the train and to ensure that all train doors are closed before allowing the train to proceed.'</i>
8.2 .3 He/she or they allowed the t rain to commence moving without ensuring that the doors there of were properly closed and locked ;	By amending sub-paragraph 8:2.3 to read as follows: <i>'He/she or they failed to prevent the train in which the Plaintiff was a commuter from being overcrowded'</i>
8.2.4 He/she or they gave the train driver a signal for the train to be set in motion at an inappropriate and dangerous time without ensuring that all commuters have alighted from the train and that all doors were closed and/or locked;	By amending sub-paragraph 8.2.4 to read as follows: <i>He/she or they failed to notify the train driver that the train was overcrowded and it was still chaotic inside and outside the train, thus the train driver should take extra time before setting the train in motion;</i>
8.2.5 He/she or they allowed the train to commence moving without ensuring that there were no commuters alighting or close to the doors inside and outside the moving train;	By deleting sub-paragraph 8.2.5 in its entirety.
8.2.6 He/she or they failed to have and keep a proper lookout around the train ;	By amending sub-paragraph 8.2.6 to read as follows and adjusting numbering accordingly: <i>'He/she failed or they to keep a proper lookout around the train and to ensure that all train doors are closed before allowing the train to proceed.'</i>
8.2.7 He/she or they failed to prevent the train in which the Plaintiff was a commuter from being overcrowded; 8.2 .8 He/she or they failed to notify the train driver that the train was overcrowded and it was still chaotic inside and outside the train, thus the train driver should take extra time before setting the train in motion; 8 .2 .9 Or any other ground which may be raised during the trial of this matter;	By deleting sub-paragraphs 8.2.7 – 8.2.9 in their entirety.
9. In and as a result of the aforesaid incident caused by the negligence of Defendant and its servants, the Plaintiff sustained the following bodily injuries: -	By amending paragraph 9 to read as follows: <i>'As a result of the gross causal negligence of its employees as set out above, the</i>

CURRENT PLEADING	PROPOSED AMENDMENT
	<i>Defendant breached its public legal duty towards the Plaintiff. The Defendant has a public legal duty to ensure the safety and security of its passengers while inside its trains and premises. As a result of the aforesaid incident caused by the negligence of the Defendant and its employees, the Plaintiff suffered the following injuries:...</i>

- [3] The respondent (defendant) filed an objection to the proposed amendment, resulting in the present application before court. The respondent's grounds of objection, as they are set forth in its notice of objection are the following:

"PREJUDICE

- 1. The Plaintiff visits the Defendant with prejudice given the timing of the amendments and after having the matter certified trial ready;*
- 2. The ten days afforded by the rules to respond to the amendments, do not allow the defendant adequate time to reinvestigate the matter given that the proposed amendments give rise to a new cause of action in terms of where and when the incident and/or accident happened;*
- 3. The amendments in the circumstances are mala fide and not in good faith, given that they amount to an afterthought, after having received the Defendant's plea and having certified the matter trial ready;*
- 4. The amendments visit's (sic) a dislocation to the Defendant's position as the said amendments introduce new facts that were deliberately avoided, by the Plaintiff at summons and before having the matter certified trial ready;*

NEW CAUSE OF ACTION

- 5. The amendments amount to a serious change and withdrawal of admissions by the Plaintiff;*

6. The amendments are a tactical advantage to the Plaintiff to introduce a new cause of action; and

7. The Plaintiff has failed to tender costs occasioned by the proposed amendments.”

- [4] It is trite that courts allow amendments where this can be done without prejudice to the other party, and it is accepted that a court considering the grant or refusal of an application for the amendment of a pleading has a discretion to do so, and that such discretion must be exercised judicially in the light of all the facts and circumstances.
- [5] Rule 28(3) which deals with objections to proposed amendments, provides as follows: “*(a)n objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.*” The requirement that the grounds of objection must be stated was introduced by amendment of the subrule in 1987 probably because of the remarks in *Jacobsz v Fall* 1981 (4) SA 871 (C) at page 872G namely that it was desirable to bring Rule 28 into line with the Rule governing exceptions (Rule 23 (3)) and require that the notice of an objection to a proposed amendment set out the grounds thereof.
- [6] In *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE) at page 1158A–C) it was held, based on the wording of subrule 28(3), that an objection not included in the notice of objection cannot be entertained.
- [7] The application for amendment is supported by an affidavit of applicant’s attorney of record who deals with each ground of objection as stated in the notice of objection where the vagueness of the objection (and its grounds are frequently pointed out).
- [8] In my view the respondent’s objection falls woefully short of what is required in terms of the rule. To object because the amendment was made after certification of trial readiness goes nowhere unless lateness results in prejudice that cannot be remedied by an order for costs. It is in any event not stated what prejudice will be suffered. The 10 – day period afforded for an objection is prescribed by rule 28. To use that as a ground of objection makes no sense. The serious charge

that the amendment is not in good faith does not come even close to being justified – it is in any event completely excluded as a possibility by the applicant’s comprehensive affidavit. The final ground of objection suggests that the applicant is seeking to withdraw “admissions” but, again, without identifying where this is in the proposed amendment. Being a proposed amendment of a claim, it is hard to imagine how “admissions” can be withdrawn by any proposed amendments of that claim. As appears from the table above, the essence of the cause of action remains unchanged.

- [9] The respondent says of the amendments that they are “*amendments (which) are a tactical advantage to the Plaintiff to introduce a new cause of action*”. Leaving aside the inelegant expression of the issue, an important principle overlooked in this objection is stated as follows in the frequently cited decision in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) per Miller J (as he then was) at page 294C:

“Needless to say, the fact that the amendment may cause the respondent to lose his case against the applicant is not of itself ‘prejudice’ of the sort which will dissuade the Court from granting it.”

- [10] Finally, the respondent objects because the applicant did not tender costs for its amendment – but rule 28 (9) takes care of that by proving that “A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.” There was no need for objection on that ground.

- [11] The usual rule is that an applicant for amendment, who seeks an indulgence, must pay the costs even if the opposition fails. This rule does not apply when the objection to the amendment is frivolous.

- [12] In my view, the objection is frivolous and the respondent should bear the costs occasioned by its opposition.

- [13] The following order is made:

a. The amendment dated 11 October 2023 is granted;

- b. The respondent/defendant is ordered to pay the costs occasioned by its opposition which is to be taxed on Scale C.


BADENHORST AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv ADV M. Mthombeni, instructed by Njuze Attorneys
ref Mr N. Njuze

For the Respondent: Adv S Nhlapo instructed by Padi Inc,
ref Ms S Lottering