

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2013/16809

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
18/11/2024	
DATE	SIGNATURE

In the matter between:

NETO SEVESTRE GOVENE

Applicant/Plaintiff

and

WIM KRYNOUW ATTORNEYS

Respondent/Defendant

JUDGMENT

KRÜGER AJ:

Summary

Application for amendment of particulars of claim- action against respondent for damages due to negligence of respondent in failing to timeously prosecute the applicant's claim against others to finality and such claim having become prescribed- opposed essentially on the grounds that too much time had passed since with the result that the respondent may be prejudiced in finding evidence to enable it to

proffer a defence to the further allegations sought to be included in the particulars of claim- Tengwa v Metrorail 2002 (1) SA 739 (C) distinguished.

Introduction

- [1] The respondent had accepted a written mandate during August 2007 from the applicant to investigate and pursue a claim on his behalf to recover damages he is alleged to have suffered as a result of injuries sustained involving a train whilst commuting. The injuries are alleged to have been suffered on or about 1 February 2007.
- [2] The respondent is alleged to have instituted action on behalf of the applicant against, amongst others, Metrorail during October 2010 (*“the 2010 summons”*) when any such claim had already become prescribed.
- [3] During May 2013, the applicant issued summons¹ against the respondent for payment in the sum of R 11 220 000.00. It is alleged this is the amount the applicant would have received from Metrorail, had the respondent properly performed its mandate.² The respondent is alleged to have negligently breached the mandate in that it failed to prosecute the applicant’s claim against Metrorail by ensuring that it not be instituted later than 1 February 2010, as a result of which the claim had become prescribed.³
- [4] The applicant now seeks to amend the particulars of claim in accordance with his notice of amendment dated 15 September 2023. The respondent objected to the proposed amendment. In consequence the applicant brought this application to amend his particulars of claim. The respondent opposes the application to amend principally on the grounds that the applicant seeks to introduce new *“jurisdictional”* facts to his particulars of claim in respect of his claim against Metrorail. It is further contended that should the amendment be allowed, the respondent will be irreparably prejudiced as it would be unable to investigate the new facts alleged due to the long passage of time since the injuries occurred.

¹ CL001-17

² Particulars of claim, par 14, CL001-15

³ Above par.13

[5] The respondent also objected to the late filing of the application to amend. At the hearing the court was informed the respondent acceded to condonation of the late filing of the application for leave to amend as prayed for by the applicant.

[6] The only issues remaining for adjudication are whether the amendment as prayed for should be allowed and who should bear the costs of the application.

The nature and extent of the amendment sought

[7] The applicant's notice of motion⁴ in respect of the proposed amendment frames the order sought as follows:

"1. Authorising the Amendment of the Applicant's Particulars of claim, as per the Notice of Amendment, dated 15 September 2023;....

4. Further and/or alternative relief."

[8] Paragraph 3.1 of the particulars of claim presently reads as follows:

"3.1 Plaintiff boarded a Metrorail train from Orlando to Springs, Gauteng."

In terms of the notice of amendment dated 15 September 2023⁵ the applicant seeks to amend to above by the insertion of the following sentence:

"at the Mzimhlope Station"

[9] Paragraph 3.2 of the particulars of claim presently reads:

"3.2 As the train was leaving Braamfontein Station Plaintiff was pushed out of the train and was struck by the moving train."

This the applicant wishes to amend by the deletion thereof and the insertion of the following:

⁴ CL017-74

⁵ CL016-1 to 016-3, see also founding affidavit CL017-7 to 017-8

Whilst the train was en route, between Johannesburg and Braamfontein stations, the Plaintiff was pushed out of the moving train through the open carriage doors.”⁶

- [10] In paragraph 6 of the particulars of claim as it stands at present, the manner in which Metrorail is alleged to have breached its duty of care towards the public and the plaintiff are set out in subparagraphs 6.1 to 6.5. In summary, it includes allegations that Metrorail had failed to ensure the safety of the public and the plaintiff on the coach of the train; had failed to take any or adequate steps to avoid the incident in which the plaintiff was injured; had failed to take any or adequate precautions to prevent injury to the plaintiff by the moving train; had failed to employ employees or an adequate number to guarantee the safety of passengers and the plaintiff; had failed to employ employees or an adequate number to prevent passengers and the plaintiff from being injured as he was and had neglected to employ security staff on the coach plaintiff was travelling on to ensure the public as well as his safety. To this the applicant wishes to add a seventh subparagraph to read as follows:

“6.7 failed to ensure that the doors of the carriage on the train were closed and remained closed between stations and whilst the train was in motion.”⁷

- [11] The respondent objected to the proposed amendment essentially on the grounds that he seeks to introduce new “*jurisdictional facts or grounds of negligence*” which will require the respondent to investigate same in order to plead thereto. Thirteen years had passed since the incident occurred and the responsible party, who had the obligation and powers to do so, never investigated the incident. It is not known whether the records which were available to the responsible party still exist and the respondent is left in a position where it is unable to proffer an appropriate defence to the acts of negligence which are sought to be introduced by the applicant.⁸

⁶ *ibid*

⁷ *ibid*

⁸ Answering affidavit, par 2, CL017-335ff

Analysis and consideration

[12] The respondent relies heavily on the judgment in *Tengwa v Metrorail*⁹ where it held:

*“...the defendant may need to search for and consult with other witnesses who, at the relevant time, were passengers in the train and which it had not thought necessary to consult with in view of the plaintiff’s claim as originally pleaded. Because of the effluxion of time it may find it difficult, if not impossible, to identify and find those passengers. In my view, therefore, to allow the amendment would cause the defendant irreparable damage.”*¹⁰

[13] In my view, care should be taken to consider the quoted passage in its proper context. In *Tengwa* the plaintiff sought to amend his pleadings during the trial when it was well advanced. In short, the plaintiff’s version of events in that matter was that he was accosted by a gang who robbed him and held open the sliding doors of the coach they were traveling in. One of the gang pushed the plaintiff out of the open doors. The defendant presented a witness contradicting the plaintiff. She testified that it was the plaintiff who had opened the sliding doors and left his left leg dangling outside the train. The injury to the plaintiff came about when the doors suddenly closed crushing the plaintiff’s protruding leg. She denied there was any incident involving an attack upon the plaintiff and testified that the plaintiff was under the influence of alcohol.¹¹

[14] It is in these circumstances and before cross examination of the defendant’s said witness commenced, that the plaintiff sought to amend his particulars of claim by introducing additional grounds of negligence namely that the defendant had failed to prevent the plaintiff sitting in a way in which he could injure himself and failed to prevent him from injuring himself.¹² The particulars of claim as it stood as regards wrongfulness and negligence was based on the plaintiff’s version. The proposed amendment sought to accommodate the version put forth by the defendant’s witness. In addition to and immediately

⁹ 2002 (1) SA 739 (C)

¹⁰ Above at 745Iff

¹¹ Above at 743Hff

¹² Above at 744C

preceding the passage relied upon by the respondent, the court stated as follows:

“However, not only did plaintiff’s notice of amendment come to light late in the proceedings, but the amendment seeks to introduce omissions relating to a completely new incident. While in the original particulars of claim the plaintiff had pleaded the attack by the robbers and defendant’s failure to protect him from them and had hitherto conducted his case on the basis of the said allegations, he now wishes to introduce the incident as narrated by Ms Mazimba with its accompanying omissions which bear no relevance to the original incident. It should also be mentioned that the version upon which the plaintiff now wishes to rely was put to him during cross-examination and his response was to deny that the same was true. Mr Van der Westhuizen has argued that, in the circumstances, should the amendment be allowed, the defendant would be unfairly prejudiced in that the amendment was not timeously raised to enable proper investigation and response thereto.

It is evident that, should the amendment be allowed, the matter would have to be postponed to give the defendant an opportunity to investigate the facts and the issues in the light of the new grounds envisaged in the amendment and, after such investigation, perhaps to amend its plea. In that connection, for example, Ms Mazimba herself may have to be consulted again in order to canvass with her the issues now raised by the amendment and, at a later date, she may again be required to testify....”¹³

[15] Contrary to *Tengwa* the amendment sought precedes the commencement of the trial. A further distinguishing factor is that the claim in the matter at hand is against the attorneys who had caused the 2010 summons to be issued and had investigated the incident as well as how it occurred in anticipation of the particulars of claim thereto. The applicant and the respondent had concluded an agreement on or about 7 August 2007 in terms whereof the respondent accepted instructions to perform professional services as the applicant’s attorney. It included, amongst others, instructions for the respondent to investigate the circumstances relating to the incident and do all things necessary in order to prosecute such claim against the responsible parties which turned out to include Metrorail.¹⁴

¹³ Above at 745Fff

¹⁴ Founding affidavit, pre-trial minute dated 30 January 2020, par 3.4, CL017-106

- [16] Applicant's counsel referred me to two affidavits deposed to by the applicant, both dated 7 August 2007. The first was prepared by the respondent¹⁵ and the second was deposed to at a police station.¹⁶ Both make reference to the applicant being forced by gunmen to jump off the train. In a time sheet dated 22 November 2010¹⁷ by the respondent reflecting a consultation with the applicant, the merits of the matter is recorded as being that four armed men boarded the train and instructed the applicant and other passengers to jump off the train. When they refused, they were pushed off.
- [17] In a report dated 23 February 2007 by McLarens Young International Insurance Loss Adjusters in respect of the incident, an allegation that the applicant was pushed from a train is recorded.¹⁸ In a further report dated 10 May 2008, the loss adjusters classifies the incident as "*Open Door-Not Serious*". A brief description of the incident is recorded as that the applicant is alleged to have been pushed from an unknown crowded train.¹⁹ This is repeated in a further report dated 18 June 2008.²⁰
- [18] The respondent addressed letters of demand to the prospective defendants, all dated 21 January 2008, prior to the 2010 summons being issued. In framing the plaintiff's claim it is stated that the plaintiff was pushed off the train as a result of which he suffered injuries. The defendants are accused of having been negligent, amongst another, "*By not insuring [sic] that the doors of the carriage in the train was closed, alternatively, did not insure [sic] that the doors remained closed between stations and whilst the train was in motion.*"²¹
- [19] In the 2010 summons issued under the hand of the respondent, the defendants were cited as being Transnet Ltd trading as Metrorail (the first defendant), the South African Rail Commuter Corporation Ltd (the second defendant) and the Minister of Safety and Security.²² It is alleged the plaintiff was attacked and/or thrown off the train by unknown persons as a result of which he suffered

¹⁵ Founding affidavit, annexure LVH6, CL017-11

¹⁶ Founding affidavit, annexure LVH7, CL017-118

¹⁷ Founding affidavit, annexure LVH9, CL017-130

¹⁸ CL011-20

¹⁹ CL011-22

²⁰ CL011-25

²¹ Letters of demand, annexure "LVH11" to the founding affidavit, CL017-136ff

²² The summons and particulars of claim is annexed to the replying affidavit marked "LVH13"

injuries.²³ Significantly, one of the grounds of negligence pleaded therein accords with the proposed paragraph 6.7 the applicant now seeks to add. It read as follows:

“The first and/or Second Defendant failed to insure [sic] that the doors of the carriage on the train was closed, alternatively did not insure [sic] that the doors remained closed between stations and whilst the trains [sic] was in motion”²⁴

[20] It is trite law amendments will always be allowed unless it is *male fide* or where it will cause an injustice to the other side which cannot be compensated by costs that is, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to be amended was filed.²⁵ Generally, our courts have exercised a wide discretion in allowing amendments conditioned by considerations of injustice and prejudice to the opposing party when the object of a proposed amendment is the raising of real issues between the parties.²⁶ Where an amendment will produce a proper ventilation of the dispute between the parties, to determine the real issues between them, an amendment will be allowed so that justice may be done.²⁷ Such wide discretion must be judicially exercised having regard to all the facts and circumstances of the matter.²⁸

Conclusion

[21] Having regard to the facts and circumstances set out above, I am not persuaded the respondent would suffer irredeemable prejudice should the amendment be authorised. The respondent’s primary contention is based on the allegation that due to the effluxion of time it is uncertain it may be able to locate records and suchlike from the responsible party or that it still exist. No evidence was placed before me of such records no longer existing, or that it may not be possible to obtain such records. Nor were any evidence produced

²³ Above par 14, CL017-209

²⁴ Above par 16.2, CL 017-210

²⁵ *Moolman v Moolman* 1927 CPD 27 at 29

²⁶ *Myers v Abramson* 1951 (3) SA 438 at 450H

²⁷ *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* at 638A and 640E-F. See *PKX Capital (Pty) Ltd v Isago at N123 Development (Pty) Ltd* [2023] JOL 60373 (GP)

²⁸ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 SA 447 (SCA) at [33]

that due to the effluxion of time it would not be possible to find any other evidence which will allow the respondent to proffer a defence to the allegations the applicant seeks to include by the proposed amendment.

[22] It cannot be ignored that the respondent was the applicant's attorney with a mandate to investigate the incident and do all things necessary to institute proceedings. From the available records it appears the responsible party accepted that the doors were open and classified the applicant's claim accordingly. Following upon its investigation of the incident, the respondent elected to demand payment from the responsible party based upon, amongst others, that it/they were negligent for failing to ensure the doors were not open and remained closed.

[23] In the result the amendment sought is authorised and an order is granted as set out below.

Order

[24] It is ordered that:

- a. An amendment to paragraph 3.1 of the particulars of claim be effected to read as follows:

3.1 Plaintiff boarded a Metrorail train from Orlando to Springs, Gauteng at the Mzimhlope Station.

- b. An amendment to paragraph 3.2 of the particulars of claim be effected to read as follows:

3.2 Whilst the train was en route, between Johannesburg and Braamfontein stations, the Plaintiff was pushed out of the moving train through the open carriage doors.

- c. An amendment to paragraph 6 of the particulars of claim be effected to include a further subparagraph to be numbered 6.7 and which reads as follows:

6.7 failed to ensure that the doors of the carriage on the train were closed and remained closed between stations and whilst the train was in motion.

d. Costs are reserved for adjudication by the trial court.



N. S. KRÜGER
NAME OF JUDGE

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting 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 **18 November 2024**.

For the applicant/plaintiff: Adv L J Khan instructed by Malcolm Lyons & Brivik Inc

For the respondent/defendant: Adv D J Combrink instructed by Maluleke Msimang & Associates

Date of hearing: 12 November 2024

Date of judgment: 18 November 2024

