

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:2024/133365

DOH: 08 SEPTEMBER 2025

DOJ: 12 SEPTEMBER 2025

1. REPORTABLE: **NO** / YES
2. OF INTEREST TO OTHER JUDGES: **NO** / YES

SIGNATURE

12 September 2025
DATE

In the matter of:

NICOLE HOOLSEMA

Applicant/Plaintiff

and

DISCOVERY INSURE LTD

Respondent/ Defendant

In re

NICOLE HOOLSEMA

Applicant/Plaintiff

and

DISCOVERY INSURE LTD

Respondent/ Defendant

This judgment was handed down remotely by uploading on caselines. Its date of delivery shall be deemed to be 12 September 2025

ORDER

1. The application succeeds.
2. Each party pays their own costs.

JUDGMENT

Bam J

Introduction

1. This is an opposed application in terms of Rule 28 (4) of the Uniform Rules.
The application is brought against the background of an action in which the applicant is the plaintiff. For ease of reference, I refer to the parties as they are in the action. The plaintiff served a notice of intention to amend her particulars of claim on 12 December 2024 upon the defendant. The defendant objected to the proposed amendment on 27 January 2025, on the basis that the particulars will remain excipiable as they disclose no cause of action and or they are vague and embarrassing.

Background

2. The plaintiff concluded an insurance agreement on 30 January 2021. In terms of the agreement, the defendant insured the plaintiff's vehicle against perils such as theft, hijacking and damages. The defendant's obligation to indemnify the plaintiff is conditional as set out in the clause below:

'Theft and hijacking cover is conditional upon the installation of a Discovery Insure Crowd/Search motor vehicle tracking device. This device must be in full working order at all times. There will be no cover if this is not done.'

3. A condition is distinguished from a term of a contract. That distinction is articulated in *Parsons Transport (Pty) Ltd v Global Insurance Ltd*, with reference to *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) 632 (A) 644E-F, as follows:

'a condition is sharply distinguished from the actual terms of a contract, and is taken to mean, not part of the obligation itself, but an external fact upon which the existence of the obligation depends. . . . The orthodox application of the word is by no means unknown to English lawyers. An obligation or a right, suspended until the happening of a stated event, is said in the common law to be subject to a condition precedent.'¹

4. On 14 November 2023, the plaintiff lodged a claim for her stolen vehicle. The claim was rejected by the defendant. On 27 November 2024, the plaintiff served the defendant with a summons. The claim was met with an exception, on the basis that the particulars of claim disclose no cause of action and or were vague and embarrassing. On 12 December 2024, the plaintiff delivered

¹ (345/2004) [2005] ZASCA 95; 2006 (1) SA 488 (SCA) (29 September 2005), paragraph 5.

a notice of intention to amend her particulars of claim, but the defendant objected stating that the particulars of claim will remain excipiable even after the proposed amendment. The present application was instituted on 5 May 2025.

The plaintiff's particulars of claim prior to the amendment [leaving out parts of the claim that do not deal with the condition]

5. The relevant paragraphs read:

'3.2 The express alternatively implied further alternatively tacit terms of the agreement [were]:

3.2.1 That the Defendant will [i]nsure and indemnify the Plaintiff against theft, general damage and perils of the vehicle on the retail value of the vehicle;

3.2.2 That the plaintiff will pay a monthly premium for the cover and indemnification;

3.2.3 That the plaintiff will fit an approved tracking device in the vehicle.

3.3 Attached is the Discovery Policy xxxxx

3.4 The plaintiff duly performed in terms of the agreement in that the monthly premiums were paid up to date and the vehicle was fitted with an approved tracking device.

4.1 In terms of the Policy Schedule the defendant will cover the vehicle in case of theft and hijack conditional upon installation of the Discovery Insure Crowd Search motor vehicle tracking device and DQ-Track.

4.2 The 2 units were installed on 31 March 2021 in accordance with the specifications as requested by the defendant.

6.1 The defendant repudiated the claim on 24 November 2023 on the grounds that the Crowd Search Device is faulty and would not provide sufficient cover.

6.2 The repudiation was based on an alleged e-mail sent to the plaintiff informing the plaintiff that the Crowd Search Device is faulty prior to the theft. The plaintiff never received such email.'

6. In terms of the proposed amendment, the particulars will read: I highlight the

changes.

'In addition to Paragraphs 3.2 to 4.2, 6.1 and 6.2 set out as in paragraph 5 above, the ff is added:

'4.3 At all material times the plaintiff was under the understanding that the tracking device was in good and working condition.

6.3 At all material times the plaintiff acted in accordance with the policy in that it had a working Crowd Device fitted to her vehicle. '

Summary of the parties' submissions

7. The plaintiff submits that her cause of action is premised on: (i) the existence of a valid insurance agreement; (2) compliance with the agreement by the insured (the plaintiff); (3) repudiation by the insurer (defendant); (4) the insured not accepting the repudiation and instead enforcing the contract; (5) damages suffered due to the repudiation; and (6) a causal link between the repudiation and the damages claimed. Thus, according to the plaintiff, the proposed amendment sets out the necessary *facta probanda* and thus substantiates a cause of action.
8. She submits that there is no requirement in law for her to plead that the device must be in full working order at all times as the defendant insists. The onus to prove compliance with the prescribed installation rests on the plaintiff and the defendant is free to attract the onus of the 'full working order' defence. She points out that her cause of action remains unaltered by the proposed amendment and is exactly the same cause of action that was pleaded in the

original particulars of claim. She submits that the amendment will not cause any prejudice to the defendant and that the latter will still have the opportunity to except to the amended particulars of claim in the event it is so inclined. She adds that the defendant has yet to deliver its plea. As to her choice of replacing the entire particulars of claim as opposed to inserting individual paragraphs, the plaintiff suggests that this is a neater way of effecting an amendment and she is entitled to utilise this option in terms of Rule 28.

9. The defendant submits that what needs to be alleged and proved by the plaintiff is that the device was in full working order at all times. The failure to plead this allegation, so it is said, has the result that the plaintiff cannot even plead that the condition was met. Consequently, no obligation arises for the defendant to act. The defendant relies on *Eagle Star Insurance v Willey*² where the court said that the insured must frame their case in such a manner as to bring their claim within the four corners of the promises made to them. The defendant adds that at the heart of this case is the question whether the obligation to indemnify the plaintiff arose for the defendant, given that the plaintiff had to meet a condition in order for the contract to impose such obligation.

10. Dealing with the first proposed amendment which reads, 'At all material times the plaintiff was under the understanding that the tracking device was in good and working condition', the defendant submits that this allegation sets out the

² 1956 (1) SA 330 (A).

plaintiff's opinion rather than the factual allegation that the condition has been met. The allegation, so it is said, does not address that the device 'was in full working order at all times'. On the second proposed amendment which reads, 'At all material times the plaintiff acted in accordance with the policy in that it ha[d] a working Crowd Device fitted to her vehicle', the defendant submits that the allegation deals with the state of the device at the time of installation. This proposed amendment according to the defendant does not allege that the device was in full working order at all times but only that it was in working order. The allegation, submits the defendant, is insufficient to demonstrate that the condition has been met. The plaintiff, according to the defendant, has failed to plead that the condition has been met and accordingly no obligation on the part of the defendant can exist and the pleadings remain excipiable.

Applicable legal principles

11. The general rule pertaining to amendment of pleadings is that the court has a discretion, which must be exercised judiciously. In *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another*, the rule was articulated thus:

'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. These principles are well summed up in... *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D), at 640 H - 641 C...:

"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.”³ (the underline is mine)

12. In *Whittaker v Roos and Another; Morant v Roos and Another*:

‘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.’⁴

13. In *Affordable Medicines Trust and Others v Minister of Health and Another*, it was said that:

‘...The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “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.” These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.’⁵

14. In *Vinpro NPC v President of the Republic of South Africa and Others*, it was said:

‘On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the

³ (393/88) [1990] ZASCA 47; 1990 (3) SA 547 (AD); [1990] 2 All SA 300 (A) (17 May 1990).

⁴ 1911 TPD 1092 at 1102-1103.

⁵ (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005), paragraph 9.

mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show prima facie that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.’⁶

15. It is a well settled rule that pleadings must be read as a whole and that an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained, *Living Hands (Pty) Ltd NO and Another v Ditz and Others*⁷. In *Lizinex (Pty) Limited v FPC Solutions (Pty) Limited and Others*, it was said that a pleading must cause serious prejudice to the excipient, to warrant an exception to be upheld.⁸

16. A plaintiff’s cause of action, as described in *Varachia v Enver NO*, with reference to *McKenzie v Farmers’ Co-operative Meat Industries Ltd* refers to, ‘every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support [their] right to judgment of the Court’⁹. In *Crawford-Brunt v Kavnat and Another*¹⁰, it was said that where it appears that the pleading may be open to exception or if the court is of the opinion that the question whether

⁶ (1741/2021) [2021] ZAWCHC 261 (3 December 2021), paragraph 25.

⁷ (42728/2012) [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ) (11 September 2012).

⁸ (2022/17136) [2023] ZAGPJHC 1261 (3 November 2023, paragraph 27.

⁹ (28658/2008) [2023] ZAGPJHC 878 (7 August 2023) paragraph 22.

¹⁰ 1927 COP 27 at 29.

the pleading is excipiable is arguable, it should still allow the amendment.

Discussion

17. The issue before this court is not whether liability on the part of the defendant has been triggered but whether, in the exercise of this court's discretion, the proposed amendment qualifies to be allowed, regard being heard to the *dicta* in *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another*, (see paragraph 11 of this judgment). I am satisfied that amendment meets the qualities set out in *Caxton*. The parties are at the early stages of this litigation and the defendant has yet to deliver its plea. Thus, I am satisfied that there will be no unfairness or prejudice to the defendant in allowing the amendment. As to the defendant's submission that the particulars will still be excipiable after the amendment is effected, this is a matter for the defendant to carefully assess going forward.

Discussion on Costs

18. As a basic rule, costs are a matter for the discretion of the presiding judicial officer. The court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*¹¹, makes this point plain:

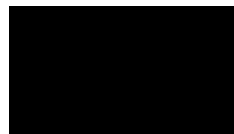
'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first.'

¹¹ (CT5/95) [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) (19 March 1996), paragraph 3.

19. I have carefully weighed the circumstances of this case and I have come to the conclusion that, notwithstanding the plaintiff's success, it will not be in the interests of justice to award costs.

Order

- (i) The application succeeds.
- (ii) Each party pays their own costs.



N.N BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

Date of Hearing: **08 September 2025**

Date of Judgment: **12 September 2025**

Appearances:

Counsel for the Applicant: **Adv P.J.A Griesel**

Instructed by: Cremer Attorneys
Brooklyn, Pretoria

Counsel for the Respondent: **Adv A.R Whitaker**

Instructed by: Keith Sutcliffe & Associates Inc.
c/o Andrea Rae Attorneys

Colbyn, Pretoria