REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 4532/2010

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA) APPLICANT
(FORMERLY CITED AS TRANSNET LIMITED t/a METRORAIL –
DEFENDANT / RESPONDENT)

AND

SIMBONILE DLAKANA RESPONDENT
(FORMERLY CITED UNDER SAME NAME AS PLAINTIFF / APPLICANT)

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

LAMPRECHT, AJ

Introduction

[1] In the main judgment of 18 August 2015 (later supplemented on 28 September 2015 with a revised judgment) I handed down my '***REASONS FOR REFUSAL TO RULE ON INTERMEDIATE ISSUE AND FOR REFERRAL TO***

***PRE-TRIAL CONFERENCING* IN TERMS OF RULE 37(8)(a)** OF THE UNIFORM RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE SEVERAL PROVINCIAL AND LOCAL DIVISIONS OF THE SUPREME COURT OF SOUTH AFRICA'.[1] The intermediate issue that I refused to rule on concerned an 'informal application', without prior notice or supporting affidavits as required in terms of Rule 6(11), by the respondent (then plaintiff / applicant) to abandon an amendment of the papers substituting defendant for the applicant that were a few days before the trial date allegedly 'effected' by plaintiff by delivering (per e-mail) the amended papers in terms of Rule 28(7) to the attorneys of the defendant before amendment, Transnet Ltd t/a Metrorail. These amended papers were never filed with the Registrar and were only brought to the attention of the presiding judge when both Counsel approached the judge in chambers after the trial was allocated at roll call for a trial of two days on the merits. The amended papers and the available documents pertaining to the amendment were handed in only during argument in court. The 'amendment' that was allegedly 'effected' concerned the substitution of the erstwhile defendant (Transnet Ltd t/a Metrorail) for the applicant, PRASA (as new defendant). I refused to rule on the issue ('abandonment of the amendment') for mainly two reasons.

[2] First, and foremost, there was no substantive application before court, for which prior notice (and such affidavits as the case might require) is required in terms of Rule 6(11) and which shall be set down for argument "at a time

[1] Emphasis added.

assigned by the registrar ***or as directed by a judge***".[2] On the trial date this matter came before me on the unrevised papers (before 'amendment') as a trial on the merits and after I had already studied the respective pleas and prepared myself to be able to promptly rule on the merits of the pleas after all evidence and arguments had been heard. I was thus taken by surprise when I was informed that there had in the past week before the allocated trial date been an amendment of the papers substituting the defendant; and, that the plaintiff was subsequent to the date on which the 'amendment' was 'effected' of second thoughts as to whether the amendment was indeed required and that he was therefore prepared to abandon the amendment altogether and to proceed on the papers as they were.

[3] There was no formal notice of application in terms of Rule 6(11) for abandonment of the 'amendment' that was purportedly effected in terms of Rule 28 and no explanation by affidavit or otherwise of the reason why the abandonment was sought. Moreover, the defendant who was reportedly substituted for another, Transnet Ltd t/a Metrorail, was never notified that plaintiff now wishes to revive the pre-existing papers and to continue against it as defendant and that plaintiff was no longer desiring to proceed against the new defendant, PRASA, for which it was substituted by means of the amendment. Procedurally, therefore, there was thus no substantive 'application' before court that required a ruling at the end of argument to the effect that the application is either granted or refused with an appropriate order as to costs. This is the main

[2] Emphasis added.

reason why I refused to 'dismiss the *application for abandonment* with costs' as requested by Counsel for applicant (defendant / respondent) on 18 August 2015.

[4] Secondly, so I held, the procedure that was followed by the plaintiff to seek and to 'effect' an amendment of the papers substituting the 'wrong' defendant for the 'correct' one, and the defendant's cooperation to allow the amendment without proper observation of the rules, was in any event bad in law since there was no proof that 'all the parties' (including the previous defendant – Transnet Ltd – and the new defendant – PRASA) had been properly notified by plaintiff that such an amendment was sought. Instead, so I learned during argument for the applicant (defendant / respondent), 'notice' was given (per e-mail)[3] and, furthermore, only to the instructing attorneys[4] acting on behalf of the previous defendant (Transnet Ltd t/a Metrorail) that plaintiff now wants to honour the consideration he disclosed during the pre-trial conference, namely that he wanted to substitute defendant for PRASA in terms of Rule 15.[5] There is no indication that such 'notice' was directed also at PRASA whereas Rule 28(1)

[3] Electronic communication per e-mail is a novel practice that has not yet been properly dealt with in the Uniform Rules or in the practice of the courts, especially as far as the 'delivery'of notifications / summonses is concerned. There are no prescripts as to how guarantees are to be sought regarding the 'delivery' and 'acknowledgement of receipt' of notices and whether e-mail addresses can be regarded on the same footing as *domicilii citandi et executandi* for the delivery of process. If notifications of amendment substituting a party for another should be allowed to be delivered and executed per e-mail, it should arguably also be in order to deliver summons in the same fashion, without requiring a Court, properly seized with such an application, to pertinently authorize such service procedure – and I think we are still a long way from adopting such practice.

[4] Cliffe Dekker Hofmeyr Inc.

[5] Although during the pre-trial conference plaintiff indicated that he would consider substituting the defendant for PRASA (Transnet's legal substitute according to Transnet's initial plea) in terms of Rule 15 and although the erstwhile defendant (Transnet Ltd t/a Metrorail) indicated that it would 'consider the amendment once requested', the notice that was sent per e-mail did not state in terms of which Rule (15 or 28) the amendment would be sought; or, if in terms of Rule 28, whether the two defendants (the substituted and the substitute) are afforded enough time to lodge objections or to file pleas if the amendment is accepted.

clearly states that a party desiring to amend papers "shall notify ***all other parties***"[6] of the intended amendment.

[5] The e-mailed 'notification' of intended amendment was simply put in the following terms: "**Attached is the amendment for the name and citation of the Defendant. Please indicate if there will be any objection thereto at the trial.**" No time prescript as intended in Rule 28(2) was inserted in the 'notice', which is a peremptory requirement.[7] The requirements of Rule 28 were thus clearly not observed. In the e-mailed response there was no indication by the said attorneys that an objection would be lodged (or that no objection would be lodged) at the trial against the proposed amendment, but it rather constituted a challenge (or invitation)[8] to the plaintiff in the following terms: "**Please effect the amendment and serve the amended pages today.**"[9] There is thus no indication on the papers that both the previous and the new defendants had officially taken notice of the envisaged amendment and that neither of them had any objection to the amendment being effected; nor was there any written indication that the same attorneys that drove the matter on behalf of Transnet Ltd t/a Metrorail had now also been briefed by the new defendant, PRASA, and that they had subsequent

---

[6] Emphasis added. This means that not only the original other party (litigant) need be notified, but also the substitute that is sought to be introduced in the action.

[7] "(2) ***The notice*** in subrule (1) ***shall state*** that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice the amendment will be effected." – Emphasis added.

[8] This 'challenge', which was obviously hastily drafted and immediately sent per e-mail, was probably due to defendant's Counsel sensing that there is now a chance of entering a special plea of prescription on behalf of PRASA without properly considering its legal status as the successor of Transnet Ltd – which plea still needs to be adjudicated in the light of defendant's own description of the history that SARCC legally succeeded Transnet ltd t/a Metrorail and later that PRASA legally succeeded SARCC and which might or might not be successful.

[9] It is wrong for one party to challenge (or invite) the other party to ignore the peremptory prescripts contained in the Uniform Rules of Court.

to receipt of the 'notice' properly been instructed to file the revised plea on behalf of PRASA. PRASA was therefore never formally placed on record. All that there was, is an informal indication from the bar, by the same Counsel that filed the initial pleas by Transnet Ltd, that PRASA now wants to continue with the action on the amended papers with the consequential plea filed.

[6] In refusing to uphold the amendment (which plaintiff now sought to abandon), I held that to allow amendments of this nature without formal notice to all parties, including the new defendant, and without requiring at least an acknowledgement of receipt and a written indication by them of what the relevant parties intend to do next, would open the way for fraud and abuse of process. This is exactly the reason why the courts have always been loath to allow such amendments without proper notice to all parties concerned, not only the existing litigants.[10] During the course of my judgment I further pointed out that, for exactly these reasons, and because it was clear on defendant's initial plea that PRASA had legally succeeded Transnet Ltd t/a Metrorail, the appropriate procedure that had to be followed was the more stringent procedure provided for in Rule 15 rather than the procedure provided for in Rule 28. Furthermore, even though courts have in the past allowed substitutions of plaintiffs and defendants in terms of Rule 28 procedure, the immutable requirement has always been that proper 'notice' to "all other parties" is required in terms of Rule 28(1) so that the

[10] *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at para [21]: "It appears to me to be axiomatic that in the context of substitution of an existing party or the joinder of another person or entity, the concept 'party' in rule 28 cannot be construed as referring only to one of the litigants to the proceedings as such a construction would obviate the need of notice to the entity intended to be substituted or being joined without any opportunity of being heard."

substituted party can have a proper opportunity, within the time stipulated in Rule 28(2) if he so wishes, to show that he will be unfairly prejudiced if the amendment is allowed to proceed.[11] One must bear in mind that 'notice' in this context takes the place of 'summons' where the initial action was instituted on summons, which is exactly the reason why Rule 28(2) states that the notice of intended amendment "shall state" that unless written notice of an objection is received within 10 days after "delivery of the notice", the amendment will be effected. The requirement of formal 'notice' and 'response' that fulfills the requirements of Rule 28(1)-(5), (7) can to my mind therefore not be remedied by an informal indication from the bar (without affidavit or written confirmation by the old and / or the new party that it has taken notice of the intended amendment and substitution and that it waives the right to proper notice in terms of the Rules) that the new defendant has taken note of the envisaged substitution and that he is now properly prepared to meet the case against him. Furthermore, the attorneys on record for the previous defendant (Transnet Ltd t/a Metrorail) have not in terms of Rule 16(1) formally notified "all other parties" that they are now acting on behalf of the new defendant (PRASA) so that plaintiff could know where to serve further process if required.

[7] One should further bear in mind that it was only the previous defendant (Transnet Ltd t/a Metrorail), not the new defendant (PRASA), which was involved in the pre-trial conference where the previous defendant (through Counsel) stated as follows:

---

[11] *Holdenstedt Farming supra* (n 10).

> "***The Defendant [Transnet Ltd t/a Metrorail – not PRASA]*** is not prepared to make this admission. The Plaintiff is considering to do a Substitution in terms of Rule 15. Should the Plaintiff do such a substitution it undertakes to substitute the Defendant, for PRASA- Passenger Rail Agency of South Africa. ***The Defendant [Transnet Ltd t/a Metrorail – not PRASA]*** will consider the plaintiff's substitution upon receipt."[12]

PRASA (or the attorneys representing PRASA) never made any formal statement in this regard.

[8] If the more stringent requirements of Rule 15[13] were followed, there would have been no room for an argument[14] that amendments of this nature can informally, in 'wishy-washy' fashion, be done and accepted by those affected; and, that the substitution could not later on proper application be abandoned (set aside or varied).[15] The main reason for my refusal to rule on the issue outlined above is therefore that I am of the opinion that serious amendments such as these (where a party is substituted for a new one, especially where that party is the defendant with a right to properly prepare and defend actions of the kind brought here) require formal (as opposed to informal) notice to[16] and acceptance

---

[12] Para [7] of the main judgment.
[13] Which I still hold is applicable in instances such as these where the new defendant (PRASA) has reportedly *ex lege* stepped into the shoes of the previous defendant (Transnet Ltd t/a Metrorail) *ex tunc*.
[14] Which is actually presented by applicant, even in this application for leave to appeal.
[15] Note that Rule 15(4) provides for such applications by any of the parties, including the one who brought the application to substitute. Such applications are however not catered for in Rule 28 procedure, which is probably the reason why applicant argued at the time that the Court had no jurisdiction to order that plaintiff be allowed to abandon amendments that were affected, even if good reason is shown.
[16] *Holdenstedt Farming v Cederberg Organic Buch Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 181B-D. See also *Van rensburg v Condoprops 42 Pty Ltd* 2009 (4) SA 539 at 545-546 quoted by applicant in para 9.b. of its heads of argument, which, if read properly, would indicate the importance of requiring formal notice to

(or consent) by[17] the new party, regardless of whether Rule 15 or Rule 28 applies.

The application for leave to appeal

[9] Feeling aggrieved by my refusal to rule on the issues between the parties (that have not properly been placed before court) and my consequential order that the parties are called upon in terms of Rule 37(8)(a) to hold or to continue with a pre-trial conference before a judge in chambers, applicant filed an application for leave to appeal 'the whole' of my judgment (in other words to appeal against each and every ruling / reason stated in my judgment). In response I provided the parties with a revised judgment dated 28 September 2015, mainly providing for additional authority for my views during the initial judgment (as I have now had proper time to reconsider the matter). In addition I provided further reasons for judgment dated 08 October 2015. In my further reasons I advised applicant to reconsider the need to appeal in the light of what has been said in the revised judgment and further reasons; and, if it decides to continue bringing the application, that it should indicate which 'order' (as opposed

---

"all the other parties": "In that regard it is not without significance that the process adopted, viz seeking an amendment to substitute one plaintiff for another, did not deprive the defendant of its right to object to the substitution (or amendment) and to raise whatever prejudice it might allege it would suffer. Indeed, in the rule 28 notice given in respect of the amendment, the defendant was specifically afforded 10 days in which to provide its written objections and informed that, if it did not do so, it would be 'deemed to have consented thereto'."

[17] *Greef v Janet* 1986 (1) SA 647 (T). See para [15] of the revised version of the main judgment. Although, as pointed out in paragraph 17. of applicant's heads of argument "[t]he cases are not harmonious as to whether a court has the power to replace by way of amendment to a summons a defendant by a person who is not party to the dispute without the latter's consent", I consider myself bound by *Greef v Janet* and I am of the opinion that, where prejudice is possible and where proper notice to the new party is therefore required as in this matter, the courts should insist (as I do) that a defendant cannot be substituted in terms of an amendment process without the formal consent of the new party.

to ‘reasons’ or ‘ruling’) applicant wants to appeal against and what the relief is that is sought in the Court of Appeal, should the appeal be allowed to continue.[18]

[10] I have subsequently been advised by the Registrar that applicant insists on bringing the application for leave to appeal and that, because my acting term has come to an end on 18 September 2015, she has arranged with the parties concerned, to provide me with written heads of argument after which I will write a formal judgment that will be handed down in court on my behalf by another judge. No revised notice of application for leave to appeal was filed in terms of Rule 49(1)(b) after I supplied the parties with my revised judgment and further reasons. I indicated to the Registrar per electronic communication (e-mail) that the procedure that she wants us to follow is in order if the Deputy Judge President deems it meet; but, pertinently requested that she inform the parties to also advance “pertinent and specific arguments” on the question whether my ‘ruling’ and / or ‘order’ of 18 August 2015 is at all appealable.

[11] I have received heads of argument from Counsel for both the applicant and the respondent. Regrettably, only Counsel for the respondent heeded my latter request and presented full argument that the ruling and order that I made are not appealable for the reasons advanced in the heads. Applicant did not deal with the appealability issue.

---

[18] *Molteno Bros v SA Railways* 1936 AD 408; *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A); *Haviland Estates (Pty) Ltd v McMaster* 1969 (2) SA 312 (A); *Holland v Deysel* 1970 (1) SA 90 (A) at 93E; *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529H; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) at 198I-J.

The appealability of the order dated 18 August 2015

[12] It probably needs be restated that a judicial decision in a civil matter is only appealable if it displays the following three attributes:

12.1 First it must be final in effect and not be susceptible of alteration by the court of first instance;

12.2 Secondly, it must be definitive of the rights of the parties; and,

12.3 Third, it must have the effect of disposing at least a substantial portion of the relief claimed.[19]

[13] It also needs be restated that there is a distinction to be drawn between a 'ruling' on the one hand and an 'order' on the other hand, the former not being subject to appeal while the latter is, subject to its having the abovementioned attributes. In *Dickinson and Another v Fischer's Executors*,[20] Innes ACJ had the following to say in this regard:

> "But every decision or ruling of a Court during the progress of a suit does not amount to an order. The term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision on the matter can properly be called an 'order'. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart

[19] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I - 533B, cited with approval by the Constitutional Court in *International Trade Administration* Commission v SCAW South Africa (Pty) Ltd [2010] ZACC 6; 2012 (4) SA 618 (CC) para 49). See now also *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015) at para [63]; and *Praescripto (Pty) Ltd v Imatu and Others In Re Mi-Tax (Pty) Ltd (In Liquidation)* (66839/12) [2015] ZAGPPHC 689 (7 October 2015) at para [3].

[20] 1914 AD 424 at 427-8.

> from the final decision on the merits. So, also in a case like the present. The parties differed as to what portion of the evidence (which was all in Court) could properly be referred to in support of the applicant's contention that the award was bad. The Court gave its ruling on the point. But that was not an order in the legal sense; it decided no definite application for relief, for none had been made; it was a mere direction to the parties with regard to the lines upon which their contention upon the merits should proceed."

In his separate concurring judgment Solomon JA said as follows:[21]

> ""The question is whether that decision was an order. In my opinion it was not. The term 'order' is a technical one, which is common in use in courts of law and which is well understood, though it may not be easy to give a precise definition of it. One thing, however, is clear, and that is no order can be made except upon an application to the Court for relief. Such an application usually takes the form of a motion or petition, and the decision of the Court upon such motion or petition is the order, which is embodied by the Registrar in a formal document. I do not say that there can be no order of Court except upon a formal motion or petition, but what is essential is that there should be an application to the Court for some relief."

In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd,*[22] Shreiner JA held as follows regarding 'preparatory' or 'procedural' orders that a Court gives during the course of preparation for a trial:

> "... [A] preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I

[21] At 429.
[22] 1948 (1) SA 839 (A) at 870.

> think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing."

The Constitutional Court has endorsed these 'policy considerations' that underlie the appealability of court orders in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[23] in the following terms:[24]

> "The 'policy considerations' that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs[25] by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court *a quo* when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes."

[14] While argument can be made that my judgment in this matter is to an extent definitive of the rights of the parties as far as procedure is concerned, I am not convinced that it has been shown that the 'ruling' (as opposed to 'order') on the procedure that had to be followed on amendment of papers in terms of Rules 15 or 28 is not susceptible of alteration by a court of first instance. The respondent may at any stage before final judgment in the matter is given (and which has not yet been given) amend his papers to the position that existed before or after the 'amendment' which was rejected by the court,

- by reinstating Transnet Ltd t/a Metrorail as defendant;[26]
- by persisting in the attempt to substitute the defendant (Transnet Ltd t/a Metrorail) for PRASA, this time by following proper procedure;

---

[23] 2012 (4) SAb618 (CC) at para [50].
[24] At para [50] of the judgment.
[25] This is exactly also part of the reason why courts are loath to allow informal disposal of procedural requirements such as 'notice' or 'summons' and 'notice of intention to defend', which lie at the heart of the reason why Rule 28 amendments of summonses seeking substitution of defendants without proper notice and consent to be substituted are not easily allowed.
[26] In the light of the pleas filed to date, which I will touch on in passing below, this might be a stupid direction to take.

- by adding PRASA as a defendant in addition to Transnet Ltd t/a Metrorail; or,
- by issuing a new summons to get the correct party before court.

The effect of my ruling can therefore still be changed at any time by a judge presiding as Court of first instance, without following the formal appeal process. I am therefore not convinced that my 'ruling' and/or 'order' of 18 August 2015 has the attributes mentioned in 12.1 and 12.3 above.

[15] All that is arguably[27] susceptible to an appeal is my order in terms of Rule 37(8)(a) that the parties are called upon to engage or to continue to engage in pre-trial conferencing held before a judge in chambers. It should however be clear from my main judgment and the papers filed and handed in at the previous appearance that the history of the matter indicates that the parties have not properly and *bona fide* engaged in pre-trial conferencing, so that the matter can speedily and effectively be disposed of. This should be enough reason for a presiding judge to make the order without creating the possibility that his order may be taken on appeal. Rule 37(8)(a) affords judges (whether presiding at a trial or otherwise) extremely wide powers in this regard, namely:

> "(8) *(a)* A judge, who need not be the judge presiding at the trial, may, **if he deems it advisable, at any time at the request of a party or *meru motu***, call upon the attorneys or advocates for the parties to hold or to continue with a conference before a judge in chambers and may direct a party to be available personally at such conference."

[27] Although I do not think that any strong argument can be made in this regard.

I do not think that a Court of Appeal would hold that I was wrong in calling upon the parties to engage in properly conducted pre-trial conferencing. In any event, the order to pre-trial conferencing is not finally determinative of the dispute whether further pre-trial conferencing is required. For example, as far as the ordered pre-trial conferencing is concerned, the parties may agree or the allocated judge in chambers may direct that further pre-trial conferencing as directed by the presiding judge in this matter is unnecessary and that they are ready to proceed to trial on the papers that existed before the abortive amendment or subject to further amendments (if any) being effected. The judge before whom the pre-trial conference is to be held may in terms of Rule 37(8(c) give any direction which might promote the effective conclusion of the matter. Furthermore, in terms of Rule 37(11) a direction made in terms of Rule 37 before commencement of the trial may at any time be amended without following the formal appeal process. I have not received an application to amend this order.

[16] In this regard I want to stress the fact that I have not entertained an application, evidence or argument to rule on the merits of the cause of action and the pleadings filed either before or as a consequence to the abortive amendment; and, I have not issued an order which can be regarded as a ‘final order’ disposing of at least a substantial portion of the relief claimed. To my mind, and without choosing sides on this issue, argument can still be made by both parties on the papers (as they existed before and after the intended ‘amendment’ where Transnet Ltd was substituted for PRASA) that prescription of the claim against

PRASA was interrupted or not interrupted by the amendment that I refused to countenance. It may even be argued that Transnet Pty Ltd t/a Metrorail is the wrong defendant if the matter goes on trial on the unamended papers and the Court may uphold or reject such plea. Such judgment is not possible in the circumstances of this matter as they currently stand, and I have never been seized with such an application. In this regard a court properly seized with the matter where PRASA is brought before court as a substitute for Transnet Ltd t/a Metrorail (in terms of proper amendment) would undoubtedly pay close attention to applicant's pleadings before and subsequent to the aborted amendment; and, in these heads of argument,

- that PRASA actually *ex lege* substituted SARCC;[28]
- which at the time of the incident had subcontracted to Transnet Ltd t/a Metrorail the management and administration of its rail commuter services;[29]
- resulting in Transnet Ltd having already admitted in the initial plea that it was responsible for the railway services at the relevant place and time that are subject to the current litigation;[30] and, therefore,
- a very real possibility exists that the court may find that the amendment sought did not give rise to a prescribed claim being resuscitated by substituting Transnet Ltd with the correct debtor in name and status.

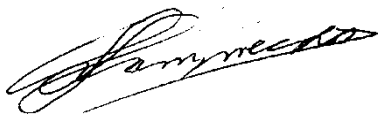
[28] E.g., para 3 of the 'Consequential Plea to Amended Particulars of Claim'; also paras 8.e.iii. and 24. of applicants heads of argument.
[29] E.g., para 23. of applicant's heads of argument.
[30] E.g., para 2.1 of the initial plea of Transnet Ltd t/a Metrorail quoted at para [2] of the main judgment.

The converse is also possible and I will pertinently desist from opining on the probabilities of either argument being upheld by a court. It is impossible to make a ruling on the pleas tendered, without full evidence and argument which were not presented or entertained in my Court, because of my refusal to rule on the interlocutory issue, namely whether the amendment was correctly effected and whether such an amendment could be abandoned after it having become effective. However, I think that the parties will be well advised to canvass the issue of prescription properly during the ordered pre-trial conferencing so that they can properly prepare for the trial should it continue on the merits. The current pleadings are confusing and confused in this regard.

Final judgment and order

[17] In the light of everything stated above and in the main judgment; and, in the further reasons supplied, I am of the opinion that there is no reasonable prospect that a Court of Appeal would come to a different conclusion than what I have. I think that it amounts to sound judicial practice to expect litigants to properly observe the rules (be it under the Uniform Rules of Court or the common law) regulating procedure; and, that such ‘wishy-washy’ attempts to amend papers substituting litigants and such ‘informal’ applications to abandon amendments that were not legally begotten should not be countenanced but deprecated in the strongest possible terms. As indicated in the preceding paragraphs I am also of the opinion that my refusal to make a ruling on the informal application to abandon an amendment that was never legally effected is not appealable.

[16] In the result the application for leave to appeal is dismissed with costs.



A A LAMPRECHT
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT
16 November 2015

Representation for the applicant:

Counsel Adv M Smit

Instructed by Attorneys: Cliffe Dekker Hofmeyr Inc

Representation for respondent

Counsel Adv LS De Klerk, SC

Instructed by Attorneys: Tyron I Pather Inc