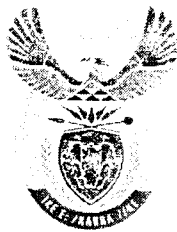



REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE	
[1] REPORTABLE: YES / NO	
[2] OF INTEREST TO OTHER JUDGES:	
YES / NO	
[3] REVISED	
DATE 24/3/17	SIGNATURE 

27/03/2017
CASE NO: 84519/2014

In the matter between:

C P CHABALALA

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

J W LOUW, J

[1] The plaintiff claims payment of damages from the defendant as a result of injuries which he sustained in an incident which occurred at the Tembisa train station involving a train operated by the defendant. By

agreement between the parties, the quantum of the plaintiff's claim was separated from the merits and postponed *sine die*.

[2] The plaintiff's cause of action is pleaded as follows in his particulars of claim:

"

4.

Plaintiff pleads that the defendant owed a duty of care to the Plaintiff to ensure that the doors of the train were closed before the train started moving into/from/out of the station, and/or to ensure that passengers on board the train would not fall or ejected there from before allowing any train to commence moving into/from/out of the station and/or to take all reasonable steps to ensure the safety of all passengers on the train at all reasonable times ("the duty of care").

5.

On or about the 29th of September 2014, at Tembisa Station within the jurisdiction of the above Honourable Court, Plaintiff was on board a train for which he had a valid ticket, whilst on board the train with the carriage's doors opened while the train was in motion Plaintiff was forced/ejected/pushed out of the carriage by other passengers, as result of which Plaintiff lost his balance and fell out of the carriage.

6.

The sole cause of Plaintiff's falling from the train, was the negligence of the conductor, whose identity is to the Plaintiff unknown, who was negligent in one or more or all of the respects:

- 1.1 *He/she signalled to the driver of the train that it was safe for the latter to set the train in motion whilst the carriages doors were open;*
- 1.2 *He/she signalled to the driver of the train that it was safe for the latter to set the train in motion without ensuring that all carriages doors were closed and/or adequately closed;*
- 1.3 *He/she failed to keep a proper and/adequate lookout;*
- 1.4 *He/she failed to pay due regard to the safety of passengers on board the train;*
- 1.5 *He or she failed to prevent the said accident when by the exercise of due and reasonable care, he/she could and should have done so.*

7.

Alternatively, *the sole cause of Plaintiff's falling from the train was the negligence of the driver of the said train, whose identity is to the Plaintiff unknown, who was negligent in one or more or all of the following respects:*

1. *He/she set the train in motion whilst its carriage doors were open;*
2. *He/she failed to close and/or ensure that all carriage doors are closed and/or adequately closed before setting the train in motion;*
3. *He/she set the train in motion without checking that all carriage doors are closed and/or adequately closed;*
4. *He/she failed to keep a proper and/or adequate lookout;*

5. *He/she failed to prevent the accident when by the exercise of due and reasonable care, he/she could and should have done so.*

Further alternatively, *the sole cause of Plaintiff's falling from the train was the joint negligence of the conductor whose identity is to the Plaintiff unknown and the Driver whose identity is to the Plaintiff unknown who were negligent in one or more or all of the respects referred to in paragraph 6 and 7 respectively above."*

[3] The plaintiff, who was twenty years old at the time of the incident, testified that he lives in Tembisa with his father and mother. He worked for his father, doing carpentry work. He was permanently employed. His father's business was called Shangu Construction. At that stage they were doing work at a house in Elandsfontein. He travelled to work by train from Tembisa to Elandsfontein and back. He said that he used to buy a monthly train ticket for travel between Leralla train station and Elandsfontein. It is common cause that Leralla station is the terminus of the particular railway line and that it is in the opposite direction, i.e. that Elandsfontein station and Leralla station are situated on the same railway line but in opposite directions from the Tembisa station.

[4] The plaintiff testified that on the day in question he was travelling back from work. He knocked off work at approximately 13h00. He boarded the train at Elandsfontein, intending to disembark at Tembisa. The train was full of passengers and he was standing, holding on to a

strap. He was standing approximately one to one-and-a-half meters from a door. The doors of the coach in which he was were open the whole distance from Elandsfontein to Tembisa. It was common cause that there are a number of other train stations between Elandsfontein and Tembisa. As the train was arriving at Tembisa station to stop, he was pushed from behind by someone and he fell from the train onto the platform. He sustained a head injury and lost consciousness. He regained consciousness in hospital.

[5] It was common cause that trains travelling from the direction of Elandsfontein to Leralla stop at platform 2 of the Tembisa station. Trains travelling from the direction of Leralla to Elandsfontein stop at platform 1. The two platforms are opposite each other with the two train lines in-between. According to the plaintiff's evidence, he fell onto platform 2. He denied that he had been "*staff riding*", a term which is apparently used for people who don't have tickets and who illegally ride on trains by standing between coaches.

[6] The plaintiff said in cross-examination that his working hours are from early morning to 16h00. On the day in question, he had sanded the last door to be worked on but couldn't varnish the door as the owner of the house had arrived and told him that he was not able to provide varnish on that day. The plaintiff therefore knocked off early. He said that he did

have a train ticket which he kept in the top pocket of the windbreaker which he wore.

[7] It was put to the plaintiff that the train guard, Mr. Nefuri, would testify that it was his duty to observe, by sticking his head out of the guard's cabin at the end of the last coach, anyone falling or being injured on a platform; that the train in question arrived at Tembisa station without incident; that passengers safely disembarked and that he did not observe anyone falling on the platform. The plaintiff's answer was that he did not know.

[8] It was then put to the plaintiff that a platform marshal, Mr. Mmothong, would testify that he had been on duty at platform 2, that he had seen the plaintiff riding between coaches on an earlier train; that he knew the plaintiff as someone who regularly rode trains in an irregular manner; that he later saw the plaintiff disembark from another train not onto the platform but onto its incorrect side onto rail tracks; that he saw the plaintiff walking between two tracks; that the train involved in the incident arrived at platform 2 and was set in motion after passengers had disembarked and embarked; that as the train was set in motion the plaintiff attempted to board from its incorrect side and was hit by the train; that once the train had left the station he found the plaintiff dazed and confused between the two lines; and that the plaintiff was then assisted by Metrorail officials who moved him away from the tracks. The

plaintiff denied all of this and said that Mmothong was lying. It was further put that Mmothong tried to establish if the plaintiff had a ticket, but that no ticket was found in his possession. The plaintiff answered that he had a ticket and that it was in his pocket.

[9] It was then further put to the plaintiff that a protection officer, Mr. Mothelo, would testify that on his arrival at the scene he found the plaintiff at the end of the platform with some Metrorail officials; that ambulance personnel had already arrived and were preparing to take the plaintiff to hospital; and that neither he nor any other official found any ticket in the plaintiff's possession. The plaintiff said he wouldn't know as he was lying down, presumably meaning that he was unconscious at the time.

[10] After completion of the cross-examination, questions were put to the plaintiff by the court. In answer thereto, the plaintiff said that he bought train tickets at Leralla; that the reason why he did not buy tickets at Tembisa was that he had been to his brother who lives in Phumelong (which I assume to be in the vicinity of to the Leralla train station) and that he had bought the ticket the day before the incident. He was further asked by the court why he had bought a monthly ticket, bearing in mind that the incident occurred on the 29th of September. His answer was that his brother had given him money for a monthly ticket and that he had to

show his brother the ticket. He also said that he bought a monthly ticket every month.

[11] Further questions were put to the plaintiff by his counsel pursuant to the questions asked by the court. The plaintiff then said that he had been using the ticket for quite some time but couldn't say on what date he bought it. He agreed that a monthly ticket expires on the last day of the month. He proceeded to say that in that particular month he received money very late and that that was the reason why he bought the ticket towards the end of the month. He was then asked whether it was a monthly ticket he bought. His answer was that it was a ticket for the week. He was then admonished by his own counsel not to change his evidence. He then said that on 15 September he had a ticket for the month of September and that the accident occurred on 29 September.

[12] The plaintiff was then asked questions by defendant's counsel. He was asked, if he had bought the monthly ticket on 28 September, the day before the incident, what he had used before that date. He answered that he had bought single tickets before he bought that ticket. He was then asked whether he was now saying that he was using single tickets before the 28th. His answer was that he used that monthly ticket for the whole of September and that he maybe did not understand well. He didn't buy the monthly ticket for the remaining two days of September, but bought it long before the incident. It was pointed out to him that the date of the

28th had come from him. His answer was that the 28th was the day on which he had come from his brother's place to Tembisa, using that ticket.

[13] The plaintiff's evidence of when he bought a train ticket or tickets and what type of ticket or tickets he bought (daily, weekly or monthly) was clearly contradictory. It is also difficult to understand why he had made reference at all to visiting his brother on the 28th if he had bought the monthly ticket much earlier.

[14] The plaintiff called Ms. Josephine Maluleke as a witness. She testified that on the day of the incident, 29 September 2014, she had gone shopping in Kempton Park and was travelling home by train, having boarded the train at Kempton Park station and intending to disembark at Tembisa. The Kempton Park train station is one of the stations between the Elandsfontein and Tembisa stations. She lives in an area of Tembisa called Tshitsama. The train was full and she had to stand. After getting in, she pushed to the middle of the coach in order to, as she put it, stand well. She didn't notice whether the doors of the coach were open or closed when the train left the Kempton Park station. When the train got to platform 2 of the Tembisa train station, passengers were pushing one another to get out. As she was getting out, she heard people screaming on the platform. When she looked, she saw a young man who had fallen on the platform and was lying on his back with his arms spread out. She

didn't know him. There was a lot of blood. She thought he was dead. She was scared and left the scene.

[15] The young man wasn't the only person who had fallen onto the platform. Ms. Maluleke testified that some of the other passengers had also fallen but rose up and left. She was told the next day by the plaintiff's parents whom she knew and who live in the same area where her house is, that their son had been injured by a train and had been taken to hospital. She then went with the parents to the hospital where she saw the plaintiff and realized that it was the person whom she had seen lying on the platform the previous day.

[16] In cross-examination, Ms. Maluleke said that the train did come to a stop at platform 2 and that the cries of the people in front of her indicated to her that something was not right. When she saw the plaintiff, he was bleeding on his head. She was asked if she saw the plaintiff being pushed out of the carriage. She said that that she did not see that, but that people were pushing and that, as she was getting out, she saw the young man who had fallen down. She had not seen him before she saw him lying on his back.

[17] Ms. Maluleke was asked whether the people cried out when the train was still moving or when it had stopped. She said that the train was stationary and in the process of getting out, those in front of her were

crying out that a person has fallen. She saw the person as she got out. She left the scene and saw the train leaving the station as she was exiting the station through a turnstile. She saw that some commuters were still standing where the plaintiff was lying.

[18] It was then also put to her what the evidence of the defendant's three witnesses would be. Her consistent answer was that she had come to court to testify about the person whom she saw having fallen on the platform and being injured. She didn't know about the things being put to her, she was not educated and had no knowledge about the operation of trains. In re-examination, Ms. Maluleke said that on the particular day, the security officers were standing where she normally buys tickets. She didn't see any security officer on the platform.

[18] Ms Maluleke was then asked by the court how it came about that she met the plaintiff's parents the following day. She said that the parents stay in the same area of Tembisa where she stays; that she had known the parents for a long time, but didn't know the plaintiff, only his younger brother; that she met the parents in the street the day after the incident and that they told her that they wanted to go the hospital to visit their child who had been injured by a train; that she was taken aback by this information as she thought that the person she had seen on the platform was dead; that she then decided to go with the parents to the hospital to see if it was the same person who had fallen on the platform; that when

she saw the injury on the right hand top side of the plaintiff's head, she realised that it was the same person; and that she tried to communicate with the plaintiff but was not able to as his voice could not be heard.

[19] Ms Maluleke was a good witness. She was sure of what she had seen and was unshaken in cross-examination.

[20] The next witness for the plaintiff was his father, Mr. Mavhanga Chabalala. He is the owner of the firm which goes by the name of Shangu Construction which does general construction work and which has been in existence since 2012. The employees of the firm are himself, the plaintiff, the plaintiff's brother Juda and a Mr. James Sibisi. He testified that on the in the morning of the day in question, the four of them travelled together by train to Elandsfontein to get to the house in Jet Park where they had been doing work since 10 September 2014, though not every day. The work consisted of the installation of the doors of the house. They each had their own monthly train ticket. The arrangement was that after arriving at the Elandsfontein train station, they would wait at a point close to the station where the owner of the house would then pick them up. On the day in question, they arrived on site between 08h00 and 09h00. There was only one door that remained which had to be sanded and varnished. The plaintiff was instructed to do the sanding and varnishing of the door. It was arranged with the owner that he would bring the varnish later during the day. Mr. Chabalala and the others then

left before 09h00 and went elsewhere. At some time after 12h00 the plaintiff phoned him and told him that the owner had arrived and told him that the varnish would not be available on that day. Mr. Chabalala told the plaintiff to go back home.

[21] Mr. Chabalala testified that after he discovered that the plaintiff had been injured, he went to the hospital on the Wednesday to see the plaintiff. Ms. Maluleke's evidence was that she spoke to the plaintiff's parents on the day after the incident which happened on the Monday. She wasn't asked on what day she accompanied the parents to the hospital. There is therefore not necessarily a discrepancy in this regard between the evidence of Ms. Maluleke and that of Mr. Chabalala. Mr. Chabalala testified that the nurses at the hospital gave the plaintiff's clothes to him and that he found a train ticket inside the plaintiff's jacket. The ticket was not produced in evidence and he was not asked where the ticket was or what had happened to it.

[22] The first witness for the plaintiff was Mr. Mmothong. He testified that on the day of the incident he was working as a safety patrol officer at Tembisa station. His duties were to prevent people without tickets from gaining access to the station. He does that from the platform entry point, i.e. where trains enter the platform. He subsequently said that he stands at the end of the platform. What he remembered of the day of the incident is that after lunch time he saw the plaintiff on board a train from

Kaalfontein (which is the first train station after Tembisa station in the direction of Elandsfontein station) proceeding to Leralla, while standing between two coaches. The plaintiff did not disembark. He thereafter came back on a train from Leralla, again riding between two coaches. He said that the plaintiff realised that they, referring to himself and other security officers, were still there at their points of duty. The plaintiff then disembarked from the train, not onto platform 1 but onto the area between the two railway lines, wanting to get away from the platforms. The plaintiff went in the direction of a train which was on the other railway line going to Leralla. That train had stopped at platform 2 and Mmothong did not notice any incident. As that train began to move, the plaintiff tried to grip onto it in order to get between its coaches. The train then knocked him on his head when he was in the vicinity of the last four coaches. The plaintiff fell to the ground between the two railway lines. Mr. Mmothong and some of his colleagues went to assist the plaintiff and moved him to a position which the plaintiff indicated with an "X" on a photograph which was marked as 2 in court bundle "C". That position is on the gravel just after the end of platform 2. Mr. Mmothong indicated the position where the plaintiff had fallen with "X1" on the same photograph. That position appears to be slightly further away from the platform in the direction of Leralla than the position marked "X". The person in the photograph standing right at the end of the platform facing the camera is Mr. Mmothong. His evidence was that that was the position where he was standing when the incident occurred. In answer to a

question put by the court, he said he could not remember how many colleagues assisted him, but he recalled two ladies, a Ms. Mokgadi and one Selina, who helped him to move the plaintiff. Neither of the two ladies nor any other colleague of Mr. Mmothong was called to testify about helping him to assist the plaintiff, or about where the plaintiff was found lying, or about helping him to move the plaintiff to the point marked "X".

[23] Mr. Mmothong said in cross-examination that he reports to the Tembisa station manager, Ms. Deseletso, and that he did report the incident to her. She was not called as a witness by the defendant. Mr. Mmothong further said that he was asked for a statement by the defendant's security company, Changing Tides, and that he gave them an oral statement which was reduced to writing. No such written statement was discovered by the defendant. What was discovered, was a copy of an occurrence book which contains entries relating to the incident by unidentified persons. I was informed by counsel for the defendant that this is an occurrence book which is kept by the defendant's Joint Operations Centre in Johannesburg. There is no reference to the plaintiff in any of the entries. Mr. Mmothong was not able to comment on why not. He agreed that he was a critical person to tell the investigators what had happened. No-one testified about the entries in the occurrence book.

[24] Mr. Mmothong further testified in cross-examination that he had previously only known the plaintiff by sight after commencing duties with the defendant a few weeks before the incident. He said that the plaintiff shouted at him and his colleagues almost on a daily basis while riding between coaches, making jokes because they were unable to apprehend him. Other "staff riders", mainly Tsonga speaking people, did the same. He couldn't remember what the plaintiff was wearing when he first saw him on the earlier train on that day, other than that the plaintiff was wearing a blue-type work suit. He did not see the plaintiff disembark and could not tell whether the plaintiff remained on the train when it continued on its way. This is contrary to his evidence in chief that the plaintiff did not disembark from the earlier train from Elandsfontein. He further said that he did not see the plaintiff on the train which arrived from Leralla, but saw him for the first time when he was between the two railway lines. This is also contrary to his evidence in chief.

[25] Mr. Mmothong was asked whether he could see the plaintiff being hit by one of the last four coaches of the train from where he was standing at the end of platform 2. He said he could, but not the plaintiff's full body. He said the compartment of the driver of the train was in line with him when the plaintiff was hit. He then said that the driver's compartment had passed him. He was asked whether he saw the plaintiff when a coach struck him. He said he did as the plaintiff was in line with him. He was asked what he meant by that. He said that one could see through the

coaches. It was put to him that it was surprising that he could see through a coach with passengers inside. His answer was that the train had people who disembarked, that he concentrated on commuters who went to the checkpoints, which I understood to be a reference to the points where their tickets are checked, and that his answer was that he didn't know. In re-examination, Mr. Mmothong said he could see through the open spaces between coaches.

[26] Mr. Mmothong was asked whether the incident occurred as the train was leaving the platform or when it was approaching. He said that it occurred when the train had exited but with four or more coaches still alongside the platform. He was then asked whether the plaintiff fell at a point opposite the platform. His answer was that where the plaintiff fell there were no protrusions from the platform. This is in line with where he indicated point "X1" on photograph 2, but appears to be in contrast with his evidence that the plaintiff was hit by one of the last four coaches when they were still alongside the platform. There was no suggestion that the plaintiff was dragged by the train up to point "X1".

[27] Mr. Mmothong did not testify, as it was put to the plaintiff in cross-examination he would, that he tried to establish if the plaintiff had a ticket, but that no ticket was found in his possession. It was put to Mr. Mmothong that there was no reason for the plaintiff to escape because he was in possession of a valid train ticket. He said he doubted that the

plaintiff had a ticket. It was then put to him that the plaintiff's father testified that the plaintiff's ticket was given to him at the hospital. He answered that he wasn't present and would not dispute that. He conceded that the plaintiff was wearing a red T-shirt and a brown jacket. In answer to questions put by the court, Mr. Mmothong said that the plaintiff boarded the train every day at Tembisa and that on most days he arrived like a person who had a ticket, but not on the day of the incident. This was contrary to his earlier evidence that he saw the plaintiff riding unlawfully between coaches almost every day.

[28] The defendant's second witness was Mr. Khathutshelo Nefuri, who was the train guard on the train which injured the plaintiff. The compartment in which a train guard sits is at the rear end of the last coach of a train. Mr. Nefuri explained that when a train stops at a station, he causes the doors of the train to open. From where he sits, he protrudes his head out of the window on the station side and observes the passengers disembarking and those embarking. He ensures that they do so safely. He then blows a whistle to signal that the doors of the coaches are about to be closed. He then closes the doors and sounds a single bell which is a signal to the driver of the train to depart. He then observes the platform to the end thereof. If he observes anyone who has been injured, he gives a signal to the driver to stop the train. On the day of the incident he saw no one that was injured.

[29] Mr. Nefuri was asked in cross-examination whether he could see from where he sits that all the doors of all the coaches of a train are closed. He said he could see that when sticking his head out the window. He was adamant that the doors were closed while the train was travelling between stations.

[30] The defendant's last witness was Mr. Mashudu Mothelo who was at the time employed by the defendant as a protection official and whose job it was to report on incidents which occur at train stations in the area. On the day of the incident he received a telephone call about the incident from a security officer by the name of Sibasa. Mr. Mothelo then went to the scene where he found the plaintiff on a stretcher, having been placed there by ambulance personnel. He wasn't able to communicate with the plaintiff as the plaintiff was unable to speak. A security officer, Mr. H. Mabasa, who no longer works for the defendant, and a Mr. Shadung, who was an investigating officer based at Kaalfontein but who has since passed away, provided him with information. On his return to his office he recorded the information reported to him in an occurrence book.

[31] According to the information provided to him, one Howard, who was a safety patrol officer and whom I understood to have been Mr. Shadung, had been an eye witness. Howard reported to him how the incident had occurred. Only the plaintiff's name was provided to Mr. Mothelo. He was told that the plaintiff had no ticket or ID document which he could furnish

to them. He said that this information Mabasa had got from Howard and relayed it to him. He was told that the plaintiff had communicated with Mabasa and Howard before he fainted. It was also conveyed to him that the plaintiff was known to be a staff rider. Neither Mabasa nor Howard was called to testify. I was informed by counsel for the defendant that Mabasa no longer works for the defendant and that the defendant was unable to trace his whereabouts. Counsel for the plaintiff informed me that his instructing attorney had been able to locate Mr. Mabasa and had caused a subpoena to be served on him, but that he was dismissed by the defendant, that he now has other employment and refuses to come to court.

[32] Mr. Mothelo said in cross-examination that on his return to office, he recorded the information which he obtained in an occurrence book and attempted to transfer the information to the defendant's Joint Operations Centre in Johannesburg, but was instructed to hand the matter over to Mr. Hloka. Mr. Hloka, who is a colleague of Mr. Mothelo and on the same rank level as Mr. Mothelo, was working the night shift on that day and Mr. Mothelo the day shift. Mr. Mothelo handed the information which he had recorded over to Mr. Hloka. He further explained to Hloka that the plaintiff did not have a train ticket. Mr. Mothelo was asked whether he searched the plaintiff for a ticket. He said that they were not allowed to search a person. Only medical personnel were allowed to do that but that the ambulance personnel did not search the plaintiff. Mr. Hloka was not

called as a witness and the occurrence book was not discovered by the plaintiff.

[33] The evidence presented on behalf of the plaintiff and that presented on behalf of the defendant is mutually destructive. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*,¹ Nienaber JA said the following at par. [5]:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanor in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and

¹ 2003 (1) SA 11 (SCA)

independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[34] I deal firstly with the plaintiff's evidence. The main difficulty I have with the credibility and reliability of his evidence is the contradictions to which I have referred about when he bought the train ticket which he alleged to have used and what type of ticket it was, i.e. whether it was a daily, weekly or monthly ticket. His father's evidence was obviously presented with the aim of corroborating the plaintiff's evidence that he did have a ticket. But the surprising thing is that the ticket was not produced in evidence. One would have expected that such a crucial piece of evidence would have been placed before the court or that there would at least have been some explanation of what had happened to it. It is noteworthy that the father sat in court all the time that the plaintiff was testifying. There is, strangely enough, a copy of a monthly train ticket in the parties' trial bundle, marked Bundle "B", which indicates that it was purchased on 31 August 2014 for the month of September 2014 for travelling between Leralla and Elandsfontein train stations. No reference

was made by any witness to this ticket. If it had been the plaintiff's ticket, I have little doubt that such evidence would have been led at a very early stage of the plaintiff's evidence and that the father would also have testified that it was the ticket which he found in the pocket of the plaintiff's jacket.

[35] A further reason for questioning the credibility of the plaintiff is the contradiction between what was pleaded on his behalf in his particulars of claim, the relevant part of which I quoted above, and his evidence in court. What was pleaded is that the sole cause of the plaintiff falling from the train was the negligence of the conductor (which I take to be a reference to Mr. Nefuri) who signaled to the driver of the train that it was safe for the latter to set the train in motion whilst the carriage doors were open or that he signaled to the driver that it was safe for the latter to set the train in motion without ensuring that all carriage doors were closed or adequately closed, or the negligence of the driver who set the train in motion whilst its carriage doors were open and failed to close the doors or failed to ensure that all carriage doors were closed or adequately closed before setting the train in motion. Contrary thereto, the evidence of the plaintiff was that as the train was arriving at Tembisa station to stop, he was pushed from behind by someone and he fell from the train onto the platform. His evidence was not that the incident occurred after the train had been set in motion.

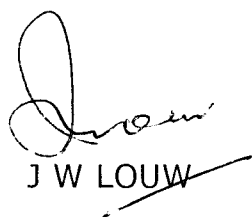
[36] The evidence of the defendant's main witness, Mr. Mmotong, is equally not free from criticism for lack of credibility and reliability. He said that he performed his duties while standing at the entry point of the platform, but then said he stands at the end of the platform. He contradicted himself about whether or not the plaintiff disembarked from the earlier train from Elandsfontein. His evidence was that the plaintiff was wearing a blue work suit but later conceded that the plaintiff was wearing a red T-shirt and a brown jacket. He said that he saw the plaintiff standing between two coaches on the train coming from Leralla and that he saw him disembark onto the area between the two railway lines. In cross-examination he said that he did not see the plaintiff on the train which arrived from Leralla, but saw him for the first time when he was between the two railway lines. He contradicted himself about whether he saw the plaintiff through the windows of the coaches or through the openings between the coaches. Counsel for the defendant conceded that there was a difference between what was pleaded and the evidence which was led. What was pleaded was that, immediately before the incident, the plaintiff was on board a train, positioned between two coaches and that, as the train approached Tembisa station travelling from Leralla station, the plaintiff alighted from the moving train onto the area between the two railway tracks and was then hit by a train travelling from the Kaalfontein direction. It was put to the plaintiff in cross-examination that he would testify that he tried to establish whether the plaintiff had a ticket. No such evidence was given by Mr. Mmotong. He testified that he

saw the plaintiff riding unlawfully between coaches almost every day. He later testified that the plaintiff on most days boarded the train at Tembisa like a person who had a ticket, but not on the day of the incident.

[36] Then there is the evidence of Ms. Maluleke for the plaintiff and that of Mr. Nefuri for the defendant which is also mutually destructive. They were both good witnesses and on my assessment of their evidence, it is not possible to find that one of them was lying or that the version of the one is more probable than that of the other. That leaves the evidence of Mr. Mothelo. His evidence of how the incident occurred was based on hearsay and was not supported by any corroborating evidence.

[37] In order to succeed, the plaintiff has to prove that the probabilities favour his case. If they are evenly balanced, which in my view they are, the plaintiff cannot succeed. On a conspectus of all the evidence, I find that the plaintiff has failed to discharge the onus of proving that his version is more probable than that of the defendant.

[38] In the result, the plaintiff's claim is dismissed with costs.



J W LOUW

JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv. M. Sibuyi

Instructed by: Mahuntsi Attorneys

For defendant: Adv. S M Tisani

Instructed by: Cliffe Dekker Hofmeyr Inc.