REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. No.

16/02/2018
DATE

SIGNATURE

CASE NO: 79535/2016

16/2/18

In the matter between:

SELLO THAHA

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

JUDGMENT

MTATI AJ:

[1] The plaintiff, Mr. Sello Thaha, is an adult male born on 22 September 1977 who was injured in an accident on 20 July 2016. He has instituted action against the Defendant, the Passenger Rail Agency of South Africa hereinafter referred to as PRASA. As per agreement between the parties the Court was requested to separate the issues between liability and the amount of damages and as a result the trial proceeded only on the question of liability on the part of PRASA.

[2] According to plaintiff's evidence, he is a regular train user and on 20 July 2016 he walked together with a co-employee from their work place to Olifantsfontein train station to board a train to Germiston station. He would then thereafter board another train to Kwesine station which is apparently within Katlehong Township.

[3] He indeed boarded the train at Olifantsfontein and on arrival at Germiston station waited for his connecting train to Kwesine. This train apparently arrived late and was full of commuters on arrival. He boarded the train and stood against a steel pole to balance himself. It transpired that this steel pole is not far from the entrance/exit door. Plaintiff testified that the door of the coach was open during the movement of the train and at no stage were the doors ever closed.

[4] The train stopped at Kutalo station being the first stop after Germiston and thereafter proceeded to Elsburg but just before Elsburg station the train stopped. Plaintiff does not know of the reason why the train stopped. After a period of about 5 minutes the train pulled out again and it is at this point that plaintiff testified that he was pushed from behind and fell outside the train. He believes that the momentum of the many

commuters inside the train led to the push to the outside. As he was pushed outside he lost his bag which had his train ticket and his work uniform.

[5] Having fallen outside the train two gentlemen appeared and asked him what happened and it is these two gentlemen who assisted him to walk to the platform of Elsburg station. There they met two women who were wearing security uniform and they offered to help asking if they should call and ambulance and plaintiff said that he is "okay". The two gentlemen assisted him further to board the same train which was now stationary at Elsburg station.

[6] The train arrived at Katlehong station and it is where plaintiff was experiencing excruciating pain in comparison to when he immediately fell off the train. The train did not proceed any further and a message was conveyed that the train will no longer proceed further to Lindela, Pilot and then to his destination being Kwesine station.

[7] One Thabo assisted him to get off the train at Katlehong station and he lay down and the next moment he saw the police and fire brigade and there nearby was a traffic officer who called for an ambulance.

[8] In cross examination the plaintiff agreed that he should not enter the train when it is not safe for him to do so. Plaintiff also stated on being asked how long he walked to Elsburg platform that he does not remember the exact time but it less than five minutes. He did not see any ticket examiners at the station. Plaintiff confirmed that he had a valid ticket and this got lost with his bag when he was pushed outside. Upon putting to him that he was partly negligent plaintiff did not deny this.

[9] Mr. Mabone Kobe was also called to testify and in brief stated that he was indeed in the company of the plaintiff when they were to board the train at Olifantsfontein station. He stated further that they both bought return tickets at the station since they to return to work for a night shift on the same day. He also testified that he was called later that same day by plaintiff's wife advising him that plaintiff will not come to work as he fell off the train and was hospitalized.

[10] This was the case of the plaintiff and at this stage Mr. Ford for the defendant applied for an absolution from the instance arguing that the plaintiff did not make a prima facie case upon which a reasonable Court may find for the plaintiff and that the defendant has no case to answer to.

[11] Without delving too much on this application, the Court found that it was primarily based on probabilities of what could have happened on the day in question and not whether or not the version of the plaintiff constituted the elements of the claim made, the credibility of the witnesses, unacceptability of evidence adduced etcetera. (***See Neon Lights (SA) Ltd v Daniel 1976 (A) SA 403; Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA525;*** and ***Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26***).

[12] The Court dismissed the application for absolution from the instance and the defendant called Mr. Albertus Edward Coetzee who testified that he was employed at PRASA as an investigator whose profile includes investigating crimes against his employer as well as claims of injuries similar to this case.

[13] His investigations of this claim revealed that it was not reported. He observed on visiting the scene where the alleged accident took place that it was approximately 120 metres from Elsburg station. The walk to

the scene of the accident from the station takes approximately 3 to 5 minutes.

[14] In cross examination he testified that about 2% of incidents are described as "no trace" meaning they would not have been reported.

Issues to be determined

[15] In my view the only issues to be determined is whether plaintiff was a lawful train user on the day in question and, if so, if there was negligence on the part of PRASA. Further, the Court should also determine whether there was any contributory negligence on the part of plaintiff.

[16] In doing so I have to examine if the evidence of the plaintiff is reasonably possibly true. It needs to be noted that whilst defendant did not present any factual evidence, that per se, does not qualify plaintiff to judgment in his favour. All the evidence evaluated holistically should be considered to satisfy the Court that the claim has been proven on the balance of probabilities.

[17] The plaintiff testified that he lost his bag which contained his ticket and work uniform. Whilst on behalf of the defendant it was disputed that there was existence of this accident, defendant did not dispute that Mr. Kobe was in the company of plaintiff when they left Olifantsfontein station. In fact the evidence of Mr. Kobe was also not disputed when he testified that plaintiff's wife called him to inform him that plaintiff will not be going to work since he fell off the train and has been hospitalized.

[18] The Court does not understand the basis of the improbabilities raised on behalf of the defendant suggesting that there cannot be persons walking along the rail line who may assist an injured person. There was no evidence tendered to thwart this evidence of the plaintiff.

[19]If plaintiff left the station together with Mr. Kobe and we accept the testimony of Mr. Kobe, then in all likelihood plaintiff was going home since he had to return back to work on the same day for another shift, hence he bought a return ticket. This is amplified by the call received from plaintiff's wife that he will not be going to work on that day. The Court finds that plaintiff was an honest witness who did not attempt to amplify his evidence because of questions posed on him. He even made a concession that he may have been partially negligent. The Court finds that he has proven his case on the balance of probabilities.

[20] I find that plaintiff was indeed a lawful passenger on the train from Germiston to Katlehong.

[21]Plaintiff testified that the train doors from Olifantsfontein to Germiston were closed whereas the train doors from Germiston to Katlehong were open. This evidence was not disputed. It could not be disputed because the defendant did not call any witness who was privy to the happenings of the 20th July 2016 when plaintiff got injured. The second question is whether the defendant had an obligation towards plaintiff to ensure that the lives of all the commuters including that of the plaintiff were safeguarded? The obligations to protect commuters like the plaintiff has not been disputed by the defendant. However, I refer to the well-known constitutional court decision in the matter of ***Mashongwa v PRASA [2015] ZACC 36*** where Chief Justice Mogoeng quoted as follows:

> "Public carriers like PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That is true of taxi operators, bus services and the railways, as attested to by numerous cases in our courts. That duty arises, in the case of PRASA, from the existence of the

relationship between carrier and passenger, usually, but not always, based on a contract. It also stems from its public law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages.

[22] The next question to be determined is whether there was any contributory negligence on the part of the plaintiff. Plaintiff conceded in cross examination that he may also have been negligent. He boarded a train that was full and whose doors could not close. Further, he appeared have not been far from the door. It was argued on behalf of the defendant that damages should be apportioned by 50% whereas on behalf of the plaintiff it was argued that the apportionment of contributory negligence should be 10%.

[23] Apportionment of negligence is not an easy task for the Court but in my view the Courts cannot just thumb suck the level of contributory negligence. In order to come to what I consider acceptable contributory negligence, the Court needs to look at past decisions and thereafter decide what is fair in the circumstances. It is common cause that the plaintiff was not far from the door hence he was easily pushed outside of a moving train.

[24] In the case of ***South African Rail Commuter Corporation Ltd v Mojapelo (A891/2008) [2011] ZAGPPHC 169*** Prinsloo J quoted many authorities that provide a guide on the apportionment of damages. It is apposite that I quote the authorities as they appear as I find same relevant for this matter:

> "[68] Our courts have held repeatedly that a railway authority, such as the appellants, allowing a train to travel with open doors, particularly an over-crowded suburban train, is negligent. One of the leading cases on this subject is that of Khupa v South African Transport Services 1990 2 SA 627 (W). The over-crowded train travelled with open doors. The plaintiff tried to disembark from the train while it was still in motion. He was

carrying a number of parcels. The court held that there was contributory negligence on his part in seeking to alight from such a train laden as he was with parcels but the percentage negligence attributed to him was only 25 percent. By comparison, the present respondent, in my view, did not make himself guilty of conduct as negligent as that of the plaintiff in Khupa. The present respondent did not attempt to disembark from the moving train. He leaned out of the train which was over-crowded and was surprised by the collision with the temporary pole obviously constructed too close to the train. He was not warned about the existence of the pole. The witness Potgieter conceded that the pole posed a danger. The pole, in my view, had to be closer to the train than what is depicted on exhibit "A", because on the exhibit "A" scenario, with the passenger leaning out of the train with his whole body and stretching out his hand and still not being able to touch the pole, it is inconceivable how this particular incident could have happened, bearing in mind the undisputed evidence of Mmako that the respondent was holding on to the grab pole with both his hands.

[69] In Transnet Ltd t/a Metro Rail & Another v Witter 2008 6 SA 549 (SCA) the trial court apportioned 50 percent against the plaintiff who had attempted to board a moving train through an open carriage door. The Supreme Court of Appeai was not prepared to interfere with this apportionment. In Ngubane v South African Transport Services 1991 1 SA 756 (AD) the plaintiff had boarded an over-crowded train. He was jostled by other passengers and lost his grip on the overhead strap and fell out of the open door. It was held that the railway authorities were solely to blame for the injuries.

[70] In Transnet Ltd t/a Metro Rail v Tshabalala [2006] 2 All SA 583 (SCA) the plaintiff was in a state of intoxication when he ran alongside a moving train trying to board same and fell. It was held that his damages had to be reduced by two thirds."

[25] I do not agree with the assertion from PRASA that apportionment of damages should be decided on 50/50 basis. In the light of the above authorities I'm inclined to agree with the Counsel for the plaintiff.

[26] Having considered all the evidence and authorities, I order as follows:

Order

1. *Defendant is liable for 90% of the plaintiff's proven or agreed damages;*

2. *Defendant is ordered to pay plaintiff's costs on the merits including costs of plaintiff's witness; and,*

3. *The determination of quantum is postponed sine die.*

MTATI AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF: ADVOCATE: ADV JF VAN DER MERWE

INSTRUCTED BY: SPRUYT INCORPORATED

FOR THE DEFENDANT: ADVOCATE B FORD

INSTRUCTED BY: JERRY NKELI & ASSOCIATES INC